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No. 15-1248

In The Supreme Court of the United States

MCLANE COMPANY, INC.,

Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

JOINT APPENDIX VOLUME II

ALLYSON N. HO
Counsel of Record
MORGAN, LEWIS & BOCKIUS LLP
1717 Main Street, Suite 3200
Dallas, Texas 75201
T. 214.466.4000
allyson.ho@morganlewis.com
Counsel for Petitioner

IAN HEATH GERSHENGORN
Acting Solicitor General
Counsel of Record
DEPARTMENT OF JUSTICE
Washington, D.C. 20530
T. 202.514.2217
SupremeCtBriefs@usdoj.gov
Counsel for Respondent

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Joshua R. Woodard (#015592)
Ashley Kasarjian (#025513)
SNELL & WILMER L.L.P.
400 E. Van Buren
Phoenix, AZ 85004-2202
Telephone: (602) 382-6000
Facsimile: (602) 382-6070
jwoodard@swlaw.com
akasarjian@swlaw.com
Attorneys for Respondent McLane Company, Inc.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Equal Employment Opportunity Commission, Petitioner, v. McLane Company, Inc. Respondent.	Case No. 2:12-mc-00081-GMS **MCLANE COMPANY, INC.'S RESPONSE TO PETITIONER'S APPLICATION FOR AN ORDER TO SHOW CAUSE WHY AN ADMINISTRATIVE SUBPOENA SHOULD NOT BE ENFORCED** (Filed Sep. 26, 2012)

McLane Company, Inc. ("McLane") responds in opposition to the E.E.O.C.'s Application for an Order to Show Cause Why an Administrative Subpoena Should Not Be Enforced and its Memorandum in Support of

the Application ("Application"). Seeking a second bite at the apple, the E.E.O.C. is attempting to obtain information the Court has already ruled that McLane is not required to produce in the ADEA matter (*E.E.O.C. v. McLane Company, Inc.*, 2:12-cv-00615-GMS, dkt. 25).

The E.E.O.C. initiated the subpoena that is the subject of the current Application (PHX-11-32) as part of its investigation of Ms. Damiana Ochoa's charge against her employer, McLane/Suneast, Inc. (d/b/a and hereinafter referred to as "McLane Sunwest"), alleging sex and disability discrimination. Notably absent from the E.E.O.C.'s Application is that McLane already agreed, on April 10, 2012, to provide the information that the Court ordered it to produce in the ADEA matter (2:12-cv-00615-GMS, dkt. 25)—but as to gender, in lieu of age–in response to Ms. Ochoa's allegations. The remaining items the E.E.O.C. now seeks were determined to be irrelevant and/or unduly burdensome, and were not required to be produced, even pursuant to the less stringent standard of the ADEA. For these reasons, McLane requests that the E.E.O.C.'s Application be denied. This Response is supported by the following Memorandum of Points and Authorities and supporting exhibits.

MEMORANDUM OF POINTS AND AUTHORITIES

I. Introduction

In its Application, the E.E.O.C. seeks to obtain two categories of information:

(1) lists of employees and applicants who have been terminated, demoted, or not hired because they did not meet the minimum requirements of the IPCS PCE, including their names, last known addresses, phone numbers and social security numbers (PHX-11-32, Request Nos. 10, 11a, 14, and 15); and

(2) data of employees and applicants who took the test, including their pedigree information as follows (PHX-11-32, Request Nos. 8(a)-(1)):

> a) name, b) social security number, c) last known home address and telephone number, d) sex, e) medical condition, f) date of application, g) date of hire (or promotion), and job classification at hire (or promotion), h) test date, test score (overall test score and any and all sub-test scores), name of test administered, test result (pass, fail, or other classification), i) position held at the time the test was administered (for individuals employed at the time or returning to work), j) position sought at the time test was administered (for individuals returning to work or seeking promotion or hire), k) reason why test was administered to each person tested, and l) date and reason for termination (if applicable).

See Mem. in Support of Appl., dkt. 2, 4:14-5:6.[1]

In light of the fact that McLane informed the E.E.O.C. it would voluntarily provide the information

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[1] Other requests in the Subpoena have apparently been withdrawn, similar to the EEOC's position in the ADEA matter. ADEA Order, Apr. 4, 2012, dkt. 25, 1:22-24.

it was required to produce in the ADEA matter, with gender information offered in lieu of age, this response is limited to the remaining data requested by the E.E.O.C.[2] [*See* Ex. A, Stenson supp. decl.[3] ¶ 18; Stenson supp. decl. Ex. 47.]

II. Factual Background

A. McLane's Corporate Structure

Subpoena PHX-11-32 (hereinafter the "Subpoena") is directed toward McLane Company, Inc., and all of its facilities/locations nationwide, including corporate. [Ex. B. Stenson decl. Ex. 14.] McLane is a supply chain services company that provides grocery supply chain solutions for convenience stores, mass merchants, and drug stores throughout the United States. [Ex. C, Koch decl. ¶ 4; Ex. D, Worsham decl. ¶ 5.] In addition to having several discrete operating locations, McLane also has a number of completely separate subsidiary companies. [Ex. C, Koch decl. ¶ 5.]

For example, in its "Grocery" business, McLane has several corporate subsidiaries, one of which is Ms.

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[2] As indicated in the ADEA matter, compiling this information takes a substantial amount of time and resources—even more than initially anticipated. McLane has been working diligently to identify, gather, and compile the information to produce to the E.E.O.C., and will be producing it as soon as possible. [Ex. A, Stenson supp. decl. ¶ 18.]

[3] The supplemental declaration of Ms. Suzanne Stenson is produced as Exhibit A in this Response. Ms. Stenson's initial declaration, as with all others produced in the ADEA matter, are produced as exhibits to this Response as well.

Ochoa's former employer, McLane Sunwest, which operates a distribution center in Goodyear, Arizona. McLane Sunwest is a Texas corporation with its corporate headquarters and principal place of business located in Temple, Texas. [*Id.*]

Separate from the Grocery operations is McLane Foodservice, Inc., which provides supply chain solutions for restaurants, with distribution centers around the country ("Foodservice"). [*Id.* at ¶ 6.] Foodservice is a Texas corporation with its corporate headquarters and principal place of business located in Carrollton, Texas. [*Id.*]

B. The Damiana Ochoa Charge

In its Application, the E.E.O.C. references *three* charges against McLane. Ms. Ochoa's Charge is discussed in detail. However, the E.E.O.C. only provides summaries of the two other charges. *See, e.g.*, Mem. in Support of Appl., dkt. 2, 1:20-28; 3:7-15; 4:6-10.[4] Significantly the Subpoena is directed *solely* to the matter of *Ochoa v. McLane Sunwest.* [*See* Ex. B, Stenson decl. Ex. 14.]

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[4] Summarizing charges unrelated to the Subpoena is insufficient for those charges to be included in the District Court's analysis. *E.E.O.C. v. Burlington N. Santa Fe R.R.*, 669 F.3d 1154, 1157, n2 (10th Cir. 2012) ("[T]he EEOC never submitted the other charges to the district court; rather, it provided summaries of those charges. Even if the other charges had any bearing on the relevance of the information sought by the EEOC, the district court could not have appropriately weighed the significance of those charges without having them in evidence.").

In early 2008, Ms. Ochoa filed an individual charge of discrimination (the "Ochoa Charge") against McLane Sunwest. [Ex. B, Stenson decl. ¶ 6.] In her charge of sex and disability discrimination, Ms. Ochoa alleges as follows:

> On or about August 28, 2007, I began maternity leave. My doctor released me to return to work on or about October 31, 2007. I was advised by Stephanie (last name unknown), Human Resources, that before returning to work, I had to take an agility test (physical capability strength test.) On or about November 1, 2007, I took the test and did not pass. On or about November 19, 2007, and December 28, 2007, I retested and did not pass. I have worked for the above-named employer for over eight years as a cigarette selector.
>
> I believe I have been discriminated against because of my sex, female, (pregnancy) in violation of Title VII of the Civil Rights Act of 1964, as amended.
>
> The physical capability strength test is given to all employees returning to work from medical leave and all new hires, regardless of job position. I believe the test violates the Americans with Disabilities Act of 1990, as amended.

[Ex. B. Stenson decl. ¶ 7; Stenson decl. Ex. 1.][5]

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[5] A second investigation was initiated by the E.E.O.C. purportedly pursuant to its authority under the ADEA. ADEA Order, Apr. 4, 2012, dkt. 25, 2:11-12. To avoid duplicating the briefing in

Although Ms. Ochoa included reference to disability in her charge, she only asserted "pregnancy." E.E.O.C. and statutory authority make clear that pregnancy does not constitute a disability under the ADA. *See, e.g., Gabriel v. City of Chicago*, 9 F.Supp.2d 974, 980 (N.D. Ill. 1998) ("Consistent with the EEOC's Interpretive Guidance, many courts have held that pregnancy, absent abnormal or unusual circumstances, is not a disability.") (external citations omitted).[6]

C. The Response to Ms. Ochoa's Charge

McLane Sunwest denied Ms. Ochoa's allegations in their entirety and provided Investigator Rusden with evidence showing that Ms. Ochoa had not been discriminated against. [Ex. B, Stenson decl. ¶ 7.] Rather, all newly hired employees at McLane Sunwest, as well as all employees away from their jobs for more than 30 days, must take a physical capability evaluation ("PCE") designed and administered by Industrial

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the ADEA matter, McLane notes that the information regarding the ADEA investigation, documents produced and information provided to the E.E.O.C. as part of the ADEA investigation, and the improper intermingling of the ADEA investigation with Ms. Ochoa's charge is discussed in detail in McLane's Response to the E.E.O.C.'s Application for an Order to Show Cause Why Administrative Subpoena Should Not Be Enforced in the ADEA matter ("McLane's ADEA Response"). *See E.E.O.C. v. McLane Company, Inc.*, 2:12-cv-00615-GMS, dkt. 15.

[6] Additionally, E.E.O.C. Investigator Barbara Rusden confirmed during the interview of McLane Sunwest Human Resources Manager, Ms. Theresa Hatch, that the E.E.O.C. was not alleging that Ms. Ochoa's pregnancy was a disability protected by the ADA. [Ex. A, Stenson supp. decl. ¶ 7.]

Physical Capability Services, Inc. ("IPCS") to ensure they are qualified (have the strength capability) to safely perform the essential functions of any position identified as physically demanding by third-party ergonomic experts, General Management Solutions, Inc. [*Id.* at ¶ 7.] In fact, the IPCS PCE is completely objective as it is an isokinetic evaluation that is provided, analyzed, and validated by third parties, and the policy applies to all employees returning from leave in excess of 30 days regardless of the reason. [*Id.*]

McLane Sunwest cooperated with the E.E.O.C.'s investigation of Ms. Ochoa's charge, including submitting a position statement and responding to several additional requests for information and documents as well as subpoenas. [*Id.* at ¶ 8; Ex. B, Stenson decl. Exs. 3, 15, 34; Ex. A, Stenson supp. decl. Exs. 36-37, 40-45, 49.] McLane Sunwest also permitted the E.E.O.C. to conduct an on-site visit of its facility, and interview Theresa Hatch, McLane Sunwest's Human Resources Manager, on March 9, 2010, and Janann Williams, McLane's Vice President, People, on August 5, 2010. [Ex. B, Stenson decl. ¶8; Ex. A, Stenson, supp. decl. ¶ 7.]

To date, McLane has produced 89 exhibits, with numerous subparts, in response to Ms. Ochoa's charge and the E.E.O.C.'s requests. [Ex. A, Stenson supp. decl. ¶¶ 5-19.] Although Ms. Ochoa alleged only gender and disability discrimination relating to McLane Sunwest, a Grocery facility and separate corporate entity from McLane, the E.E.O.C. expanded its requests for information nationwide, seeking information for all of

McLane, including not only Grocery, but also Foodservice. [Ex. B, Stenson decl. ¶ 9.]

McLane already has produced an Excel database that included all individuals who have taken the IPCS PCE in any Grocery position nationwide through the date of the data collection. [Ex. A, Stenson supp. decl. ¶ 19; Stenson supp. decl. Ex. 49.] The database also included a unique employee ID number for each person who has taken the IPCS PCE, their location, gender, job class, test date, reason for taking the test, level achieved, whether they met the minimum requirements, and details regarding their IPCS scores. [*Id.; see also* Ex. A, Stenson supp. decl. Ex. 47.]

To produce the data requested by the E.E.O.C., McLane had to first request and obtain it from third-party IPCS. Not wanting to rely solely on third-party data, McLane has since undertaken extraordinary and time-consuming quality analysis to correct any IPCS data that conflicted with McLane's PeopleSoft data. [Ex. A, Stenson supp. decl. ¶¶ 18-20; Ex. A, Stenson supp. decl. Ex. 49.] After extensive analysis, McLane provided updated and corrected IPCS data to the E.E.O.C.[7] [*Id.*]

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[7] The inconsistencies with IPCS's data and the comparison with PeopleSoft data would have occurred irrespective of whether those taking the IPCS PCE were identified using social security numbers or otherwise. [Ex. A, Stenson supp. decl. Ex. 49.]

D. McLane's Additional Production in Response to the Court's April 4, 2012 Order in the ADEA Matter

The Court ruled in the ADEA matter that "Respondent must provide Petitioner with test results and any adverse employment actions taken against those who failed the test. It found that Respondent need not provide Petitioner with names, contact information, social security numbers, and other pedigree information (other than age) of those who took the test." ADEA Order, Aug. 9, 2012, dkt. 34, 1:27-2:3.

To be consistent with the Court's ruling, McLane voluntarily agreed to also produce similar data relating to Ms. Ochoa's charge—except with gender data in lieu of age. [Ex. A, Stenson supp. decl. Ex. 47.] Consistent with this Court's Order, McLane already provided updated and corrected data with IPCS scoring. McLane is in the process of identifying, gathering, and compiling information as to whether an adverse action occurred within 90 days of the IPCS PCE, and will be producing it to the E.E.O.C. as soon as the data set is complete. [Ex. A, Stenson supp. decl. ¶ 18.][8]

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[8] This analysis has turned out to be more complicated and time-consuming than originally anticipated. Programs were written to identify job changes in PeopleSoft. Individualized inquiries were necessary for certain IPCS PCE events because neither PeopleSoft nor any other computerized data set contained such information.

III. Legal Analysis

When reviewing the validity of an administrative subpoena, the Court conducts a three-part inquiry as to whether:

> (1) Congress has granted the authority to investigate; (2) procedural requirements have been followed; and (3) the evidence is relevant and material to the investigation.

Children's Hosp. Med. Ctr., 719 F.2d 1426, 1430 (9th Cir. 1983), *abrogated on other grounds by Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), *as recognized by Prudential Ins. Co. v. Lai*, 42 F.3d 1299, 1303 (9th Cir. 1994).

"[T]he EEOC's investigative authority is tied to charges filed with the Commission; unlike other federal agencies that possess plenary authority to demand to see records relevant to matters within their jurisdiction, the EEOC is entitled access only to evidence 'relevant to the charge under investigation.'" *E.E.O.C. v. Shell Oil Co.*, 466 U.S. 54, 64 (1984); *EEOC v. Kronos, Inc.*, No. 09-3219, (D. Penn 2009). If this showing is made, the party being investigated bears the burden to show that the inquiry is unreasonable because it is overbroad or unduly burdensome. *EEOC v. Bashas Inc.*, No. CIV 09-0209-PHX-RCB, 2011 U.S. Dist. LEXIS 133447, at *28 (D. Ariz. Sept. 30, 2011).

McLane objects to the Subpoena as the E.E.O.C. is unable to meet the three-pronged test articulated in *Children's Hospital* and because the request is overly broad and unduly burdensome. Accordingly, McLane

requests that the Court deny the E.E.O.C.'s Application to enforce Subpoena PHX-11-32.

A. The Information and Documents Sought Are Not Relevant or Material to the Investigation and the Subpoena Exceeds the E.E.O.C.'s Statutory Authority[9]

While the E.E.O.C. has authority to subpoena evidence in an ADA and Title VII investigation, its authority is tied to the charge of discrimination. 29 U.S.C. § 161; 42 U.S.C. § 2000e-9; 42 U.S.C. § 12117(a); *E.E.O.C. v. Federal Exp. Corp.*, 558 F.3d 842, 849 (9th Cir. 2009). The concept of relevancy is viewed broadly, but the E.E.O.C.'s authority is not without constraints, as it must proceed with "a realistic expectation rather than an idle hope that something may be discovered." *E.E.O.C. v. United Air Lines, Inc.*, 287 F.3d 643, 653 (7th Cir. 2002) (citation omitted) (explaining the relevance requirement is to "cabin the E.E.O.C.'s authority

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[9] In addition to exceeding its authority, the E.E.O.C. is employing tactics that are overreaching. As discussed in detail in McLane's ADEA Response, the E.E.O.C. has, among other things, contacted McLane Sunwest management employees without going through counsel, called a McLane Sunwest teammate in northern California and insisted that she provide the name and phone number of a friend who was a former teammate of McLane Sunwest, sent letters creating the impression that McLane has done something wrong and that the employee was obligated to cooperate with and immediately contact Investigator Rusden, and re-opened time-barred and/or previously resolved charges. [Ex. B, Stenson decl. ¶¶ 34-35; *see also* McLane Response, &ct. 15, 18:4-19:10.]

and prevent fishing expeditions."). "[T]he EEOC shall have access to any evidence that 'is relevant to the charge under investigation.'" *E.E.O.C. v. Quantum Foods, LLC*, 2010 U.S. Dist. LEXIS 41846, *7 (N.D. Ill. Apr. 26, 2010). This requirement reflects Congress' intent to prevent the E.E.O.C. from engaging in unrestrained fishing expeditions. *United Airlines*, 287 F.3d at 652-53.

The Court expressed concerns in the ADEA matter regarding the E.E.O.C. "trolling for possible complainants[.]"[10] ADEA Order, Apr. 4, 2012, dkt. 25, 9:3-5. Rather than attempt to assuage those concerns, the E.E.O.C. again seeks the very pedigree information that triggered the Court's concern in the first instance. The E.E.O.C. claims to be investigating "whether the IPCS test violates the ADA [or Title VII.]" Mem. in Support of Appl., dkt. 2, 8:16-18. Yet, despite many opportunities, the E.E.O.C. simply has not shown that obtaining the employees' and applicants' pedigree information relates to the adverse impact analysis of whether or not the IPCS PCE violates Title VII or the ADA.[11]

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[10] Investigator Rusden has also commented that the E.E.O.C. was not interested in engaging in discussions as to the ultimate issues, but rather was focused on finding "victims." [Ex. A, Stenson supp. decl. Ex. 39.]

[11] No one, not even the E.E.O.C., suggests that the IPCS PCE was applied discriminatorily, as opposed to neutrally. As such, disparate impact is the only relevant inquiry. *See Raytheon v. Hernandez*, 540 U.S. 44, 54 (2003) (holding that a neutrally applied policy is a "quintessential legitimate, nondiscriminatory

The E.E.O.C. claims it needs "information regarding disabilities of some individuals [because such disabilities] may not be readily apparent to Respondent." Mem. in Support of Appl., dkt. 2, 8:21-28. However, it belies logic to argue that McLane (or any of its subsidiaries) would have been required to provide an individualized accommodation or even engage in the interactive process with an individual who did not provide even minimal information to McLane regarding their alleged disabilities. *See, e.g., Zivkovic v. S. Cal. Edison Co.*, 302 F.3d 1080, 1089 (9th Cir. 2002) ("[O]nce an employee requests an accommodation or an employer recognizes the employee needs an accommodation but the employee cannot request it because of a disability, the employer must engage in an interactive process . . . "); *see also Hedberg v. Indiana Bell Tel. Co.*, 47 F.3d 928, 934 (7th Cir. 1995) ("The ADA does not require clairvoyance.").

Additionally, each person taking the IPCS PCE is informed of the nature of the isokinetic assessment and asked to confirm that he/she has the physical capability to participate. In fact, each person who has taken the IPCS PCE attested as follows:

> *I have read and understand the above information and I understand that I will be asked to give maximum, all-out effort* ***within the limits of my ability****, and that I will be performing short periods of strenuous exercise. I*

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reason" to disparate treatment claims and distinguishing same from disparate impact claims).

*understand that I am not expected to work through discomfort that I can not tolerate. **

**To the best of my knowledge, I feel that I can complete all parts of the physical capability evaluation, so I do hereby authorize _____ to perform the tests described and consent to participate in the evaluations.*

[*See* Ex. A, Stenson supp. decl. Exs. 50 (emphasis in original), 51-52.] Thus, any person listed in the IPCS data attested to their physical capability to participate in the IPCS PCE.

Even under the less stringent standard of relevance under the ADEA,[12] the E.E.O.C. was not granted *carte blanche* authority to demand production of whatever it wanted. "The Court previously limited the scope of Petitioner's subpoena because Petitioners are investigating whether the PCE has an adverse impact on older test-takers, and the names, addresses, and social security numbers of test-takers is not related to a disparate impact investigation when '[t]he stated definition of the investigation does not suggest that the E.E.O.C. is investigating any acts of discrimination against particular individuals.'" ADEA Order, dkt. 34, 4:28-5:4. Likewise, Ms. Ochoa does not allege disparate treatment due to her alleged disability (pregnancy) or gender. Rather, she admits the IPCS PCE was required of all applicants and people returning from a leave of

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[12] The E.E.O.C. concedes the "relevance" standard of Title VII is more stringent than the "related to" standard of the ADEA. ADEA Order, dkt. 34, p. 5, n. 2.

absence in excess of thirty days. She complains only because she did not meet the minimum requirements, and was unable to return to work. [Ex. B, Stenson decl. Ex. 1.]

As the Court further noted, "[o]nce it has information concerning all persons who took the test and their ages when they took it, as well as their scores, the E.E.O.C. will have the information necessary to ascertain whether there is a correlation between age and test performance. But, even assuming there is such a correlation, the E.E.O.C. has no congressional authority, without more, to seek the names, contact information, or social security numbers of those people under the age of 40 who took the test. Respondent will not be required to provide contact information for people who have no standing to bring an ADEA claim. *See* 29 C.F.R. § 1625.2." ADEA Order, Apr. 4, 2012, dkt. 25, 5:8-15.

Even *if* the E.E.O.C. were permitted to obtain pedigree information in the ADEA matter—which it was not (other than age)—there is no reason why it would be entitled to receive information in the investigation of Ms. Ochoa's charge for individuals who do not even have standing pursuant to a charge based on her allegations—such as males, individuals without disabilities (such as Ms. Ochoa herself), or individuals who worked at separate and distinct corporate entities of McLane, as Ms. Ochoa only worked for McLane Sunwest, in the Grocery division.

B. The Information and Documents Sought Are Overbroad and Unduly Burdensome

McLane objects to certain portions of the Subpoena as overbroad and unduly burdensome. "[C]ompliance with a subpoena is excused if it 'threatens to unduly disrupt or seriously hinder normal operations of a business.'" *E.E.O.C. v. Bashas, Inc.*, No. CIV 09-0209-PHX-RCB, 2011 U.S. Dist. LEXIS 133447, at *35 (D. Ariz. Sept. 30, 2011) (quoting *E.E.O.C. v. Aaron Bros., Inc.*, 620 F. Supp. 2d 1102, 1106 (C.D. Cal. 2009)). Further, "[i]f the personnel or financial burden on the employer is great compared to the resources the employer has at its disposal, the district court should attempt to alleviate this burden." *E.E.O.C. v. Bashas, Inc.*, No. CIV 09-0209-PHX-RCB, 2011 U.S. Dist. LEXIS 133447, at *35 (D. Ariz. Sept. 30, 2011) (quoting *E.E.O.C. v. United Air Lines, Inc.*, 287 F.3d 643, 653 (7th Cir. 2002)). "Essentially, this court's task is to weigh the likely relevance of the requested material to the investigation against the burden to [Respondent] of producing the material." *E.E.O.C. v. Ford Motor Credit Co.*, 26 F.3d 44, 47 (6th Cir. 1994).

With regard to its Grocery operations, McLane already has offered to produce the applicants' and employees': (i) sex; (ii) score on the test; (iii) position applied for or reason the test was taken; (iv) the requisite score required; and (v) whether the applicant or the employee suffered an adverse employment action

within 90 days.[13] Accordingly, the following analysis focuses on the *remaining* information the E.E.O.C. is requesting:

> (1) the names, last known addresses, phone numbers and social security numbers of the employees and applicants who suffered an adverse employment action because they did not meet the minimum qualifications for the IPCS PCE (PHX-11-32, Request Nos. 10, 11a, 14, and 15); and
>
> (2) the following data for all employees and applicants who took the IPCS PCE:
>
> > a) name, b) social security number, c) last known home address and telephone number, . . . e) medical condition, f) date of application, g) date of hire (or promotion), and job classification at hire (or promotion), . . . and l) date and reason for termination (if applicable) (PHX-11-32, Request Nos. 8(a)-(l)).

See Mem. in Support of Appl., dkt. 2, 4:14-5:6 (abbreviated to identify items in dispute). For the reasons discussed below, the aforementioned request is overly broad, and the production of such information would be unduly burdensome.

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[13] In fact, McLane already produced all of this information, with the sole exception that, despite diligent efforts, it is still completing the analysis of adverse employment actions.

i. The E.E.O.C. Has Conveyed No Basis for Expanding Its Investigation

The E.E.O.C. notified McLane Sunwest on November 9, 2010 that "the Commission has made a decision to broaden the scope of its investigation for the above-referenced charge to all McLane facilities/locations nationwide." [Ex. B., Stenson decl. Ex. 10.] The E.E.O.C. offered no justification whatsoever for expanding the investigation from Ms. Ochoa's employer, to the entire McLane Grocery division, then to McLane's Foodservice division, and then to all McLane corporate.

In *E.E.O.C. v. Burlington Northern Santa Fe Railroad*, the Tenth Circuit affirmed the underlying district court's refusal to enforce an administrative subpoena and explained that the E.E.O.C.'s statement that it was broadening its investigation conveyed no basis for expanding the investigation. 669 F.3d 1154 (10th Cir. 2012); *see also E.E.O.C. v. Packard Electric Div.*, 569 F.2d 315, 316-18 (5th Cir. 1978) (holding the district court did not err in limiting the E.E.O.C.'s subpoenas to tailor disclosure to the character of the particular charges made rather than allowing the E.E.O.C. to obtain "broad statistical information as to the respective employers' entire work force"). While McLane's Grocery division and Foodservice both use the IPCS PCE, the decision to use the PCE was made separately from each other, the implementation dates differ, and even the underlying Job Task Analyses differ. [Ex. A, Stenson supp. decl. ¶ 21.] Moreover, Ms. Ochoa never worked for Foodservice (Ex. A, Stenson

supp. decl. ¶ 21), and the additional information requested is irrelevant to her charge.

ii. The Demand for Information Has Been Made for an Illegitimate Purpose

McLane fully briefed this argument in the ADEA Matter, explaining the E.E.O.C.'s barrage of requests through its intertwined investigations. *Supra*, n. 4. For brevity, McLane will not further address this argument here, but incorporates it by this reference.

iii. The Cost of Gathering the Information is Unduly Burdensome in Light of the Company's Normal Operating Costs and Would Threaten Normal Business Operations

"A Court may decline to enforce a valid subpoena if the request is unduly burdensome." *Quantum*, 2010 U.S. Dist. LEXIS 41846 at *15 (explaining that a subpoena is excessively burdensome if it threatens the normal operation of the business); *see also E.E.O.C. v. United Air Lines*, 287 F.3d 643, 655 (7th Cir. 2002). "What is unduly burdensome depends on the particular facts of each case and no hard and fast rule can be applied to resolve the question." *United Air Lines*, 287 F.3d at 653 (citation omitted).

Certain items requested in the Subpoena would require manual person-by-person analysis and data compilation on thousands of current and former employees and applicants nationwide, significantly

disrupting McLane's business operations. IPCS (the third-party vendor) maintains a database relating to individuals who have taken the IPCS PCE in relation to positions in McLane or its affiliated companies. To facilitate the E.E.O.C.'s analysis, McLane obtained information from IPCS relating to all Grocery operations and produced the same—albeit with no names and social security numbers. At the time McLane initially obtained the data, it reflected 12,091 individuals having taken the IPCS PCE in relation to Grocery operations alone. As of January 20, 2012, IPCS data showed 13,883 individuals having taken the IPCS PCE in relation to Grocery operations. [Ex. E, Perlioni decl. ¶ 5.] Likewise, as reflected in the production on September 5, 2012, which is current through March 2012, the spreadsheet shows 15,941 instances the IPCS PCE has been taken in relation to Grocery operations, with 14,004 individuals having taken the IPCS PCE. [Ex. A, Stenson supp. decl. ¶ 20.]

(a) The IPCS database does not show the last known address or phone number

The IPCS database has only limited information, requiring McLane to locate records from across its various facilities, from various people and files, and/or in PeopleSoft. The E.E.O.C. seeks the last known address and phone number for every person who has taken the IPCS PCE, regardless of whether they did or did not meet the minimum requirements for the position they

sought—in other words, for the entire universe of now, 14,004 individuals. [*Id.*][14]

Contact information for every person taking the IPCS PCE regardless of result is unnecessary to any legitimate disparate impact investigation. Under the circumstances, such information is also unduly burdensome. The IPCS database of individuals who have taken the PCE does not include last known address or phone number. [Ex. D, Worsham decl. ¶ 7.] McLane would have to research each individual name or social security number in its PeopleSoft database for information as to current and former employees (not applicants). [*Id.* at ¶ 8.]

Moreover, for applicants who were never hired and, thus, not in PeopleSoft, more time consuming research would be necessary. The IPCS data reveals 13,498 IPCS PCE were administered for *new hire* testing for Grocery operations. [Ex. A, Stenson supp. decl. ¶ 20.] Of those, 2,239 individuals did not achieve the minimum requirements to safely perform the essential functions of the position they sought. [*Id.*] Assuming that none of the 2,239 individuals were hired, no PeopleSoft data would be available, including no contact information. [*Id.*] Last known addresses and phone numbers of applicants would not be available on any log or in any database. [Ex. F, Sill decl. ¶ 14; Ex. E, Perlioni decl. ¶ 7.] To obtain last known addresses and

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[14] McLane's concerns regarding the disclosure of confidential information were briefed in its ADEA Response and, therefore, are not repeated here. *See* McLane's ADEA Response, 29:8-25.

phone numbers would require a manual search of hard copy or outlook files, assuming the applications and resumes still exist—which is unlikely going back to 2006 as requested by the E.E.O.C. [Ex. F, Sill decl. ¶¶ 14, 16.]

Considering all of the variables, locating last known addresses for applicants who *were never hired*, to the extent they still exist, would take 30 minutes per person on average. [*Id.* at ¶ 16.] Assuming 2,239 such candidates, using the average of 30 minutes per candidate, this would require 67,170 minutes/1,119.5 hours to complete, building in no extra time to account for anomalies and the more time intensive search necessary for the more dated applications. For the most part, this search would have to be done at the local facility site and would be very disruptive to the operations. [*Id.*] McLane simply does not have the manpower to undertake this compilation—particularly in a short timeframe—as it would seriously disrupt its operations.

(b) The IPCS database does not show "date of application"

The E.E.O.C. seeks the "date of application" for every person who has taken the IPCS PCE, regardless of whether they met the minimum requirements for the position they sought. It is unclear why the date of application is even relevant to any legitimate analysis the E.E.O.C. would undertake. Date of application is

not in the IPCS database and is not maintained in PeopleSoft. [Ex. D, Worsham decl. ¶ 9; Ex. E, Perlioni decl. ¶ 7.] It would require a manual examination of individual employee hard copy files and applicant data to determine the date each of the 14,004 individuals taking the IPCS PCE signed and submitted their application to McLane. [Ex. D, Worsham decl. ¶ 9; Ex. A, Stenson supp. decl. ¶ 20.] This would be an incredible burden that is simply too onerous and would be difficult, if not impossible, to estimate.

(c) The IPCS database does not show the date of hire (or promotion)

Similar to the discussion regarding the "date of application" above, McLane would have to research this information in PeopleSoft by the social security numbers from the IPCS database. [Ex. D, Worsham decl. ¶ 8; Ex. E, Perlioni decl. ¶ 7.] Ms. Worsham believes that dates of hire could be captured by the PeopleSoft query. [Ex. D, Worsham decl. ¶ 8.] However, it would be almost impossible to use a query in PeopleSoft to generate a report of dates of "promotion" for all of those employees listed on the IPCS spreadsheet. [Ex. D, Worsham decl. ¶ 9.] There are so many variables in the job codes reflecting changes to job status, it would require an unduly burdensome manual analysis of every job change to determine if the change reflected an actual promotion, and there would be numerous job code changes for every individual in the system. [Ex. D, Worsham decl. ¶ 9.] This also would be an incredible

burden that is simply too onerous and, again, would be difficult to estimate.

(d) The IPCS database does not show job classification at hire

Similar to the discussion above, McLane would have to research this information in PeopleSoft by the social security numbers in the IPCS database. [Ex. D, Worsham decl. ¶ 8; Ex. E, Perlioni decl. ¶ 7.]

(e) The IPCS database does not show date and reason of termination

The E.E.O.C. seeks the reason for termination for every person who has taken the IPCS PCE, regardless of whether they met the minimum requirements for the position they sought and regardless of whether the termination had anything to do with the person's level of achievement on the IPCS PCE. However, such information is not included in the IPCS database. [Ex. E, Perlioni decl. ¶ 7.]

As the E.E.O.C.'s request is written, if an employee achieved the level of physical capability required to perform the essential functions of the position sought and was hired, but later fired for stealing, McLane would be required to disclose the "reason for termination" despite the fact such reason is entirely irrelevant to the E.E.O.C.'s investigation. Moreover, the E.E.O.C. also requests the name and job titles for the individuals responsible for hiring, promoting, and/or terminating every person who has taken the

IPCS PCE. Not only is this information far from relevant, it would require a manual analysis of every person among the 15,941 who is no longer employed to identify the decision-maker—likely having nothing to do with the IPCS PCE.

(f) The IPCS database does not identify medical conditions, and its request is vague, overbroad, and unduly burdensome

The E.E.O.C. seeks information relating to the vague concept of "medical conditions." However, Ms. Ochoa's charge does not (1) allege disparate treatment under the ADA or, in particular, a failure to accommodate, which is inherently an individualized inquiry, or (2) identify a qualified disability. The E.E.O.C. also has not articulated a reason as to why it needs this information for its analysis. Rather, the E.E.O.C. is, again, "trolling" for purported victims, under the guise of a disparate impact case, even though it has never identified any particular disability or medical condition within the scope of its investigation. Further, an inquiry about medical conditions is not relevant to a disparate impact analysis.

McLane does not track medical conditions or maintain such a database. It is impossible to locate information regarding applicants' medical conditions, if any. To the extent any information regarding employees' medical conditions is even available, it would require a page-by-page review and analysis of the

confidential files of thousands of employees. This request is unlimited and seeks information spanning from the common cold to cancer. This would result in a substantial burden to Company resources. It would be difficult, if not impossible, to estimate the number of personnel hours needed to complete this amorphous analysis and compilation of data at each of the various Grocery locations. [Ex. A, Stenson supp. decl. ¶ 23.]

C. The E.E.O.C. is Not Entitled to Pedigree Information

The E.E.O.C. refers to the decisions in *State of Arizona ex rel. v. GEO Group, Inc.* and *E.E.O.C. v. CRST Van Expedited, Inc.*, for the proposition that the E.E.O.C. may be required to identify putative class members during its investigation. *See* Mem. in Support of Appl., dkt. 2, 9:22-10:10. However, nothing in those cases suggests that this requirement somehow alters the relevancy requirements, or would require McLane to provide the E.E.O.C. with pedigree information at this juncture and in this disparate impact investigation.

Geo Group is a disparate treatment case in which the charging party alleged she was sexually harassed and retaliated against for reporting the incident. *See* Mem. in Support of Appl., Ex. B (copy of unpublished opinion) at p. 2. Likewise, *CRST* is also a disparate treatment case alleging that female employees were subjected to a hostile work environment. 679 F.3d 657,

682-83 (8th Cir. 2012). Ms. Ochoa alleged disparate impact discrimination based on the use of the IPCS PCE, and there is simply no need for any additional information for the E.E.O.C. to conduct its analysis.

IV. Conclusion

The E.E.O.C. continues to barrage McLane with burdensome, overbroad and irrelevant requests relating to the IPCS PCE. Significantly, the E.E.O.C. has not demonstrated why the requested information is relevant to its investigation, or why McLane should suffer the serious disruption to its business to produce the remaining requested information. Accordingly, McLane respectfully requests that the E.E.O.C.'s Application be denied.

DATED this 26th day of September, 2012.

SNELL & WILMER L.L.P

By: s/ Ashley Kasarjian
Joshua R. Woodard
Ashley Kasarjian
One Arizona Center
400 East Van Buren
Phoenix, Arizona 85004-2202

[Certificate of Service Omitted]

[Doc. 9-1]

EXHIBIT A

Joshua R. Woodard (#015592)
Ashley Kasarjian (#025513)
SNELL & WILMER L.L.P.
400 E. Van Buren
Phoenix, AZ 85004-2202
Telephone: (602) 382-6000
Facsimile: (602) 382-6070
jwoodard@swlaw.com
akasarjian@swlaw.com
Attorneys for Respondent McLane Company, Inc.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Equal Employment Opportunity Commission, Petitioner, v. McLane Company, Inc. Respondent.	Case No. 2:12-mc-00081-GMS **DECLARATION OF SUZANNE H. STENSON IN SUPPORT OF RESPONDENT MCLANE COMPANY, INC.'S RESPONSE TO PETITIONER'S APPLICATION FOR AN ORDER TO SHOW CAUSE WHY AN ADMINISTRATIVE SUBPOENA SHOULD NOT BE ENFORCED**

1. I, SUZANNE H. STENSON, declare as follows:

2. I have personal knowledge of the facts and matters set forth in this declaration and could and would testify competently and truthfully to the same if called as a witness and placed under oath. I am over 18 years of age.

3. I make this declaration in support of Respondent McLane Company, Inc.'s ("McLane") Response to Petitioner's Application for an Order to Show Cause Why An Administrative Subpoena Should Not Be Enforced, in the case styled *E.E.O.C. v. McLane Company, Inc.*, Case No. 2:12-mc-00081-GMS (the "Title VII Matter").

4. This declaration is intended to supplement my declaration executed and filed on February 17, 2012, in the matter *E.E.O.C. v. McLane Company, Inc.*, Case No. 2:12-mc-00007-GMS/2:12-cv-00615-GMS (hereinafter referred to as the "ADEA Matter", with the corresponding declaration referred to as the "ADEA Declaration"), and to provide specific information related to the Title VII Matter.

5. McLane/Suneast, Inc. (d/b/a and hereinafter referred to as "McLane Sunwest"), filed its position statement in response to Ms. Damiana Ochoa's charge of sex and disability discrimination (ADEA Declaration, Ex. 1) on April 25, 2008 and produced exhibits 1-24 to support its response. A true and correct copy of the response is attached as **Exhibit 36**.

6. A supplemental response addressing the E.E.O.C.'s requests for information and documents, and producing exhibits 25-64 was sent on November 13, 2009 (ADEA Declaration, Ex. 3).

7. McLane Sunwest permitted representatives of the E.E.O.C. to conduct an on-site visit of its facility, and agreed to the interview of Theresa Hatch, McLane Sunwest's Human Resources Manager, on March 9, 2010, and an interview of Janann Williams, McLane's Vice President, People, on August 5, 2010. Upon information and belief, when asked during the interview of Ms. Hatch whether the E.E.O.C. was alleging that pregnancy was a disability protected by the ADA or whether the E.E.O.C. was pursuing a pregnancy disability claim under the ADA, the E.E.O.C. responded that it was not.

8. The E.E.O.C. notified McLane Sunwest that it "made a decision to broaden the scope of its investigation for the above-referenced charge to all McLane facilities/locations nationwide" on November 9, 2010. (ADEA Declaration, Ex. 8).

9. McLane Sunwest provided additional information on January 14, 2011, and produced exhibits 65A-75. A true and correct copy of the response is attached as **Exhibit 37**.

10. In response to Subpoena No. PHX-11-32, dated February 15, 2011 (ADEA Declaration, Ex. 14), which included the expanded scope, and requested information from all of McLane Company, Inc.'s facilities

and locations nationwide, Respondents McLane Sunwest and McLane Company, Inc. jointly filed a Petition to Revoke on February 22, 2011 (ADEA Declaration, Ex. 15).

11. On March 25, 2011, the E.E.O.C. issued a second subpoena (No. PHX-11-42) relating to Ms. Ochoa's Charge. (ADEA Declaration, Ex. 19). McLane and McLane Sunwest jointly filed a Petition to Revoke on April 1, 2011. A true and correct copy of the Petition to Revoke is attached as **Exhibit 38**. A true and correct copy of correspondence regarding the parties' forthcoming meeting, sent to the E.E.O.C. on August 19, 2011, is attached as **Exhibit 39**.

12. McLane Sunwest provided additional information to the E.E.O.C. on December 6, 2011, and produced exhibit 76. A true and correct copy of that correspondence is attached as **Exhibit 40**.

13. On December 22, 2011, additional information and exhibits 77-83 were produced. A true and correct copy of that correspondence is attached as **Exhibit 41**.

14. On February 6, 2012, the E.E.O.C. issued a third subpoena (No. PHX 12-20) relating to its investigation into Ms. Ochoa's Charge. (ADEA Declaration, Ex. 32). McLane Sunwest filed its Petition to Revoke on February 13, 2012. (ADEA Declaration, Ex. 34).

15. On February 22, 2012, additional information and exhibits 84-86 were produced. A true and

correct copy of that correspondence is attached as **Exhibit 42**.

16. On March 2, 2012 and March 6, 2012, additional videos were sent as part of a supplemental response to exhibit 84. True and correct copies of the related correspondence are attached as **Exhibit 43** and **Exhibit 44**, respectively. Additionally, a supplement to an exhibit produced previously in PDF format was produced on April 30, 2012, in Excel format as exhibit 87. A true and correct copy of that correspondence is attached as **Exhibit 45**.

17. The E.E.O.C. issued its Final Determination on Petition to Revoke or Modify Subpoenas ("Final Determination"), denying the Petition to Revoke Subpoena No. 11-32 on March 21, 2012. A true and correct copy of the Final Determination is attached as **Exhibit 46**.

18. McLane Sunwest responded to the Final Determination on April 10, 2012. It noted that the E.E.O.C. references only subpoena requests 8(a)-(1), 10, 11(a), 14 and 15, and addressed its response only to those requests. McLane Sunwest recognized that, by implication, the E.E.O.C. granted the remaining requests, including requests 1, 2, 3, 4, 5, 6, 7, 8(m), 9, 11(b), 12, 13, 16, 17, and 18. As a result of the Court's Order in the ADEA Matter, McLane Sunwest further agreed to voluntarily provide the information the Court ordered to be produced, with gender information offered in lieu of age. On that same date, McLane Sunwest also produced exhibit 88. A true and correct copy

of the response is attached as **Exhibit 47**. McLane has produced all information required in the ADEA order, with the exception of information as to adverse employment actions within 90 days. McLane is in the process of identifying, gathering, and compiling this information and will be producing it to the E.E.O.C. as soon as the data set is complete. Despite diligent efforts, this undertaking has taken much more time than originally anticipated.

19. As acknowledged in its May 10, 2012 correspondence (a true and correct copy is attached as **Exhibit 48**), errors appeared to have been made by IPCS in their de-duplication of data collected from IPCS; therefore, a new set of quality-checked data, without de-duplication, was produced as exhibit 89 on September 5, 2012. A true and correct copy of that correspondence is attached as **Exhibit 49**.

20. As reflected in the production on September 5, 2012, the spreadsheet shows: 15,941 instances the IPCS PCE has been taken in relation to Grocery operations; 14,004 employees or applicants took the IPCS PCE; 13,498 IPCS PCE were administered for new hire testing for Grocery operations and, of those, 2,239 individuals did not achieve the minimum requirements to safely perform the essential functions of the position they sought; and 2,443 individuals took the IPCS PCE for reasons other than "new hire," such as job transfer or return to work.

21. While the Grocery division and Foodservice both use the IPCS PCE, the decision to use the PCE

was made separately from each other, the implementation dates differ, and my understanding is that even the underlying Job Task Analyses differ. Ms. Ochoa never worked for Foodservice.

22. It is my understanding from IPCS that certain forms are required to be completed by every individual prior to taking the IPCS PCE. To my knowledge, the individuals who have taken the IPCS PCE completed these forms and, thereby, designated themselves as being capable of taking the IPCS PCE. A true and correct copy of the Authorization and Consent Form is attached as **Exhibit 50**, the Memorandum of Understanding is attached as **Exhibit 51**, and the IPCS Guidelines are attached as **Exhibit 52**

23. The E.E.O.C. has requested information regarding every employees' and applicants' "medical condition," McLane does not track medical conditions, if any, or maintain a database of such information. My understanding is that it is impossible to locate information regarding the applicants' medical conditions, if any. To the extent any information regarding employees' medical conditions is even available, it would require a page-by-page review and analysis of the confidential files of the thousands of employees who took the IPCS PCE. Further, because the E.E.O.C. has never identified a type of disability or medical condition within the scope of its purported investigation, the potential analysis is unlimited and seeks information spanning from the common cold to cancer. This would result in a substantial burden to Company resources. It would be difficult, if not impossible, to estimate the

number of personnel hours needed to complete this analysis and compilation of data at each of the various Grocery locations.

24. I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

EXECUTED on September 26, 2012 at Temple, Texas.

/s/ Suzanne H. Stenson
SUZANNE H. STENSON

[Doc. 9-1]

EXHIBIT 37

Snell & Wilmer
CCC L.L.P.CCC
LAW OFFICES

One Arizona Center
400 East Van Buren Street
Suite 1900
Phoenix, Arizona 85004-2202
602.382.6000
602-382-6070 (Fax)
www.swlaw.com

DENVER
LAS VEGAS
LOS ANGELES
LOS CABOS
ORANGE COUNTY
PHOENIX
SALT LAKE CITY
TUCSON

Ashley T. Kasarjian
602-382-6544
akasarjian@swlaw.com

January 14, 2011

VIA HAND-DELIVERY

Barbara Rusden, Investigator
Equal Employment Opportunity Commission
Phoenix District Office
3300 N. Central Avenue, Suite 690
Phoenix, AZ 85012

Re: *Charge No.:* *548-2008-01093*
Charging Party: *Damiana Ochoa*
Respondent: *McLane Sunwest, Inc.*

Dear Ms. Rusden:

As previously advised, this law firm represents the Respondent, McLane Sunwest, Inc. (hereinafter referred to as "McLane Sunwest" or the "Company") in the above-referenced matter. This letter is in response to your request for information dated November 9, 2010.

As a preliminary matter, the Company objects to the expansion of the investigation outside the scope of the underlying Charge into a division of the Company which Charging Party was not even employed. As referenced in our email correspondence dated September 21, 2010, December 20, 2010, and January 14, 2011, the Company believes that an investigation into all McLane locations is overly broad, unduly burdensome, and seeks information that is not relevant to the underlying Charge of Discrimination.

The employees in the food division are not similarly situated to the employees in the grocery division. In addition to the fact that the separate McLane facilities are independent centers, the food service division

and grocery division are entirely distinct companies operationally. Ms. Janann Williams explained during her August 5, 2010 interview that the decision to use the IPCS test in the grocery division was made independently of the decision to use the IPCS test in the food service division. Ms. Williams further noted that each division had its own Job Task Analyses prepared. Accordingly, the prior actions of the food service division are not the subject of or related to Ms. Ochoa's Charge. Ms. Ochoa was never employed in a food service distribution center, and none of her allegations relate to the food service distribution centers. The EEOC's newly expanded request—now seeking information and documentation from distinct companies, distinct operations, and distinct divisions of McLane Company, Inc.—cannot fairly or accurately be argued to have arisen from the EEOC's investigation of Ms. Ochoa's Charge.

Moreover, many of the requests below are objectionable for several reasons, including that they: (1) require the Company to produce or create information, electronic or otherwise, in a medium or format other than that in which it is maintained in the normal course of business, and therefore are unduly burdensome; (2) require production and indexing of extensive electronically stored information, the collection and production of which would seriously disrupt the Company's normal business operations and cause significant monetary expense to the Company that would outweigh the probative value of such information;

(3) seek information and/or documents that are not relevant to the Charge under investigation or any aspect of any Charging Party's current or former employment with the Company and/or the validity of the IPCS test, and therefore are not reasonably calculated to lead to the discovery of admissible evidence in any proceeding related thereto the allegations in the Charge;[1] (4) seek information concerning employment policies, practices, or decisions other than those at issue in the Charge, and therefore are not reasonably calculated to lead to the discovery of admissible evidence; (5) are not properly limited in time and seek documents beyond any statute of limitations applicable to the Charge, and therefore are not reasonably calculated to lead to the discovery of admissible evidence; (6) require the Company to provide information and/or documents about employees nationwide at independent facilities owned

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[1] "The scope of the judicial inquiry in an EEOC or any other agency subpoena enforcement proceeding is quite narrow. The critical questions are: (1) whether Congress has granted the authority to investigate; (2) whether procedural requirements have been followed; and (3) whether the evidence is relevant and material to the investigation." *E.E.O.C. v. Fed. Express Corp.*, 558 F.3d 842, 848 (9th Cir. 2009). The EEOC is only entitled to inspect and copy evidence that is relevant to the charge under investigation. *Id.* at 849 (citing *E.E.O.C. v. Shell Oil Co.*, 466 U.S. 54, 63 (1984) (quoting 42 U.S.C. § 2000e-8(a)); *see also University of Penn. v. E.E.O.C.*, 493 U.S. 182, 194 (1990) ("[U]nless specifically provided otherwise in the statute, the EEOC may obtain 'relevant' evidence."). "[T]he EEOC's investigative authority is tied to charges filed with the Commission; unlike other federal agencies that possess plenary authority to demand to see records relevant to matters within their jurisdiction, the EEOC is entitled access only to evidence 'relevant to the charge under investigation.'" *Shell Oil*, 466 U.S, at 64.

and/or operated by McLane Company; (7) require documents to be provided that are not within the possession, custody or control of McLane Sunwest or any other facilities in the grocery division of McLane Company; and (8) require the Company to provide information and/or documents, including proprietary and confidential information, concerning McLane Sunwest's and/or McLane Company's employees, policies, practices, or decisions other than those at issue in the Charge.

As you are aware, the Company has cooperated with the EEOC and its investigation of Ms. Ochoa's Charge, and is willing to continue complying with the agency's requests for information, to the extent they are reasonable and permissible. In response to Ms. Ochoa's Charge, McLane Sunwest submitted a position statement with 24 supporting exhibits on April 25, 2008. In response to the EEOC's first Request for Information ("First RFI"), McLane Sunwest submitted a supplemental response and supporting exhibits 25-64 on November 13, 2009. McLane Sunwest also permitted the EEOC to conduct an on-site visit of the McLane Sunwest facility, and agreed to the interview of Theresa Hatch, Human Resources Manager, on March 9, 2010, and Janann Williams, Vice President, People, on August 5, 2010.

However, the current request triggers the same concerns the Company previously raised regarding the August 6, 2010 request for information ("Second RFI"), which requested information regarding McLane Sunwest and McLane Company. As discussed in the

Company's response on September 3, 2010, the Company is concerned with the intermingling and timing of the requests for information in Ms. Ochoa's matter and the new Commissioner's Charge regarding the Age Discrimination in Employment Act, in addition to their burdensome nature. *See, e.g., EEOC v. Bashas*, 2009 WL 3241763 (D. Ariz. Sept. 30, 2009). Of significance, the expansive requests for information were nearly identical (even after their revision), and were even initially identified as if the Charges were one-and-the-same, despite Ms. Ochoa not being over 40 years old at the time of her employment. While the request for age-related data was removed, the EEOC has continued to assert that it is expanding the scope of its investigation of Ms. Ochoa's Charge nationwide, despite the fact that the Company is comprised of operationally-distinct divisions.

The Company continues to be willing to respond to any reasonable requests for information and to assist in any manner that is appropriately responsive to the EEOC's specific investigative needs, while still being cognizant of the Company's legitimate concerns. To this end, the responses to the current requests for information are provided below in bold. The Company hereby incorporates all of the above objections into each of the following responses.

REQUEST NO. 1:

Submit the name, title, address and telephone number of the person to whom further inquiries regarding this charge should be directed.

RESPONSE TO REQUEST NO. 1:

Please continue to direct all correspondence relating to Ms. Ochoa's charge to Josh Woodard and Ashley Kasarjian, as follows:

Josh Woodard
Ashley Kasarjian
Snell & Wilmer, L.L.P
400 East Van Buren
Phoenix, Arizona 85004
Phone: (602) 382-6281 (Woodard);
(602) 382-6544 (Kasarjian)

REQUEST NO. 2:

Provide the correct legal name and business address of the Respondent named in the charge and describe the nature of Respondent's business. Include any and all trade names, d/b/a's, or former names. Also include documentation either already in existence or prepared by Respondent in response to this request that describes or provides the following information:

McLane/Suneast, Inc. (aka McLane Sunwest)
14149 W. McDowell Road
Goodyear, AZ 85395

a. the type of corporate or business entity

Corporation

b. approximate number of employees during calendar years 2007 and 2008

McLane Sunwest had 511 employees as of January 1, 2007, and 497 employees as of January 1, 2008.

c. location of corporate headquarters

McLane/Suneast, Inc. (aka McLane Sunwest)
14149 W. McDowell Road
Goodyear, AZ 85395

d. current status of the corporation, i.e. active, inactive, or another status

Active

e. the name of Respondent's corporate officers, directors, and owners

The Company objects to the information request regarding the Company's corporate officers, directors and owners on the grounds that it seeks information that is not relevant to the Charge under investigation or any aspect of any Charging Party's current or former employment with the company, and therefore is not reasonably calculated to lead to the discovery of admissible evidence in any proceeding related to the allegations in the Charge filed with the EEOC.

f. the statutory agent for Respondent in Arizona

CT Corporation

g. the relationship between Respondent and any superior and subordinate business entities, including, but not limited to, any parent entity, subsidiaries, branches, or affiliates.

i. Provide the legal name and business address of all superior and subordinate business entities identified.

ii. Provide the statutory agent for all supervisor and subordinate business entities identified.

Respondent is owned by McLane Company, Inc. The address for McLane Company, Inc. is P.O. Box 6115, Temple, Texas, 76503. Its statutory agent is CT Corporation.

RESPONSE TO REQUEST NO. 2:

Please see the responses listed above in bold.

REQUEST NO. 3:

Does the Respondent have a policy of liability insurance that will provide coverage for the claims asserted in this charge? If so, please provide a copy of the policy.

RESPONSE TO REQUEST NO. 3:

The Company objects to the request for information related to the policies regarding liability insurance on the grounds that it seeks

information and/or documents that are not relevant to the Charge under investigation or any aspect of any Charging Party's current or former employment with the company, and therefore is not reasonably calculated to lead to the discovery of admissible evidence in any proceeding related to the allegations in the Charge filed with the EEOC.

REQUEST NO. 4:

Submit a copy of any employee handbook in effect during the relevant time period and

a. explain in detail how this information is disseminated to employees, and

b. provide the date when any employee handbook went into effect, and the dates of any revisions.

RESPONSE TO REQUEST NO. 4:

The EEOC identified the "relevant time period" as January 1, 2006 to the present. Notably, an alleged discriminatory practice that is not made the subject of a timely charge of discrimination with the EEOC may not later be challenged in court. *See, e.g., EEOC v. Freeman*, 2010 U.S. Dist. LEXIS 41336 (D. Md. Apr. 26, 2010). Accordingly, the Company objects to the requests to beyond the extent that they are beyond the statute of limitations applicable to Ms. Ochoa's Charge. Without waiving this objection, the Company provides the documents identified

within this response. The Company further objects to this request to the extent that policies and procedures are requested that are unrelated to the policies applicable to Ms. Ochoa's Charge. Without waiving this objection, the following provisions of the Employee Handbook from the grocery divisions are attached:

Exhibit	Date	y/Provi
65(A)	July 2005	Equal Employment Opportunity
65(B)	September 2008	
65(C)	January 2010	
65(D)	February 2010	
65(E)	September 2010	
66(A)	July 2005	Harassment/Sexual Harassment/ Investigating and Resolving Complaints
66(B)	September 2008	
66(C)	January 2010	
66(D)	February 2010	
66(E)	September 2010	
67(A)	July 2005	Safety
67(B)	September 2008	
67(C)	January 2010	
67(D)	February 2010	
67(E)	September 2010	
68(A)	July 2005	Leave of Absence
68(B)	September 2008–	
68(C)	February 2009	
69(D)	January 2010	
69(E)	February 2010	
68(F)	September 2010	

69(A)	**July 2005**	**Communication and Conduct**
69(B)	**September 2008**	
69(C)	**July 2009**	
69(D)	**January 2010**	
69(E)	**February 2010**	
69(F)	**September 2010**	

Responding to subsection a, the Employee Handbooks are provided to employees upon hire and also following any substantial revisions. Employees receive notification of all minor revisions to individual policies, and the Handbooks are always available on the Company's internal network, eSERVE.

Responding to subsection b, the date that any provision went into effect is listed on the chart above and/or on the policy or Handbook itself.

REQUEST NO. 5:

List each test used by respondent during the relevant time period, including but not limited to Industrial Physical capability Strength test (IPCS) and Isokinetic Physical Capability test (IPCT), and list any variations of each test in use.

a. For each test variation listed, identify all jobs or job classifications for which it has been used.

RESPONSE TO REQUEST NO. 5:

The Company objects to this request as it seeks information concerning employment policies, practices, or decisions other than those at issue in the Charge, and therefore is not reasonably calculated to lead to the discovery of admissible evidence. Additionally, the request seeks documents beyond any statute of limitations applicable to the Charge.

REQUEST NO. 6:

For each test or variation (including variations arising from modifications to the test made by Respondent) identified in #5 above, and used by any facility of Respondent, including but not limited to IPCS and IPCT:

a. describe how the test was developed and how it is used by Respondent,

b. provide the name of each test's or variation's author or creator, the original publication or creation date of the test or variation; and the jobs, employer, or industry for which the test or variation was originally designed,

c. describe the process that led to Respondent's implementation of each test or variation, including the names and titles of all key decision makers involved in the process. Include all correspondence, including e-mails exchanged, relating to the decision to implement the test at each of respondent's locations. Include any

and all documents reviewed by any key decision makers in addition to paragraph 7 below,

d. specify the effective dates of use of each test or variation at each of Respondent's locations,

e. provide any and all internal regulations or guidelines regarding each test or variation, including any and all regulations or guidelines for individual(s) who administer the test and individual(s) who take the test,

f. provide a description of how each test or variation is administered and scored. Include a description of each stage of the process (e.g., application process if the test is used in an employee selection context; or process by which employees are deemed eligible to return to work if the test is required of employees returning to work after an extended leave), the point at which the test is administered in this process, the physical setting in which the test is administered, and the name and position of the person(s) who administer and score the test(s),

g. provide a list of all jobs and job classifications for which any test or variation is used,

h. for each job or job classification for which a test or variation is used, identify the specific test or variation (listed in response to paragraph 5) used for that job or job classification,

i. for each job or job classification for which a test or variation is used, identify the score(s) that are considered "passing" and failing," or any other rating classification used, provide details on the process by which any scoring/classification system was established, and provide details about the process by which Respondent determined the minimum score considered "passing."

j. for each job or job classification for which a test or variation is used, provide job descriptions,

k. provide copies of any and all adverse impact studies performed for each test or variation.

RESPONSE TO REQUEST NO. 6:

Please refer to the response to request number five. Further, the Company objects to this request as it is unduly burdensome and would require each company and/or division of McLane Company to produce and/or create extensive information and documentation including but not limited to the use, development, origination, implementation, scoring, and administration of tests at each facility. The Company has produced detailed information regarding the IPCS test in its position statement, dated April 25, 2008 and the response to the First RFI, dated November 13, 2009, as well as at the interviews of Theresa Hatch, Human Resources Manager, on March 9, 2010, and Janann Williams, Vice President, People, on August 5, 2010.

REQUEST NO. 7:

Provide copies of any and all validation studies or validation evidence relating to the use of all tests or variations identified in #5 and #6 above, to include any notes or other documents concerning development and implementation of the test by Respondent.

RESPONSE TO REQUEST NO. 7:

The Company has produced the validation study provided by Vedder Price P.C., dated January 14, 2005, as Exhibit 15 to the position statement submitted on April 25, 2008. Additionally, the Company produced the validation studies provided by Vedder Price P.C., dated April 21, 2008 and August 23, 2002, as Exhibits 30 and 31 to the First RFI, dated November 13, 2009.

REQUEST NO. 8:

For all positions at Respondent's facilities/ locations nationwide for which any test or variation identified in #5and #6 above is used, provide the Job Task Analysis for each position. Include:

a. a list of all subject matter experts who were consulted regarding the Job Task Analysis, including name and job title, and

b. any documents containing job analysis information for all positions wherein testing is applied to employees and/or new hires.

RESPONSE TO REQUEST NO. 8:

The Company has produced the Job Task Analyses ("JTAs"), as Exhibits 41-54 to the First RFI, dated November 19, 2009. Additionally, the following JTAs from the grocery divisions of McLane Company, Inc. are enclosed with this response.

Exhibit	Job Task Analysis
70	Checker (4/14/10)
71	Forklift Dock Hauler (3/30/10)
72	Full Case Loader (8/16/06)
73	Heavy Selector (4/13/10)
74	Light Selector (4/13/10)
75	Team Lead (4/13/10)

REQUEST NO. 9:

For the relevant time period, provide documents or a listing[2] of information identifying all persons who took any test or variation identified in #5 and #6 in connection with employment at any of Respondent's locations or facilities nationwide. Provide a separate list for each facility/location nationwide and annotate the list by:

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[2] The data should be provided on compact disk. It may be written in one of the following formats: Excel, Access or ASCII delimited ("csv"). Other formats may be acceptable if approved by the EEOC prior to submission. Regardless of format, EEOC asks that the first row consist of the field or variable names with subsequent rows for employee observations without blanks or repeating variable names or titles. There should be one column for each variable requested.

a. name

b. social security number

c. last known home address and telephone number

d. sex

e. medical condition

f. date of application

g. date of hire (or promotion), and job classification at hire (or promotion)

h. test date, test score (overall test score and any and all sub-test scores) name of test administered, test result (pass, fail, or other classification)

i. position held at the time test was administered (for individuals employed at the time or returning to work)

j. position sought at the time test was administered (for individuals returning to work or seeking promotion or hire)

k. reason why test was administered to each person tested

l. date and reason for termination (if applicable)

m. name and job title of any individual(s) responsible for the hiring, promotion, or termination decisions based on test results for each person who took any test or variation.

RESPONSE TO REQUEST NO. 9:

The Company objects to this request as it would require the Company to produce or create information, electronically stored or otherwise, in a medium or format other than that in which it is maintained in the normal course of business; require production and indexing of extensive information, the collection and production of which would seriously disrupt the Company's normal business operations and cause significant monetary expense to the Company that would outweigh the probative value of such information; and it seeks information and/or documents that are not relevant to the Charge under investigation, the validity of the IPCS test, or any aspect of any Charging Party's current or former employment with the company, and therefore are not reasonably calculated to lead to the discovery of admissible evidence in any proceeding related thereto the allegations in the Charge. The information requested relates to thousands of employees and is not actively tracked and/or maintained by the Company. It would be unduly burdensome for the Company to produce the requested information as it would require the Company to categorize, classify and identify information regarding its employees on a person-by-person basis.

REQUEST NO. 10:

Provide a list of all Respondent's facilities and locations in existence during the relevant time period.

RESPONSE TO REQUEST NO. 10:

The following is a list of all McLane Company, Inc.'s grocery locations.

Division	Phone	Address
McLane Carolina	252-972-2500	7253 NC Hwy 48, Battleboro, NC 27809
McLane Concord	603-746-8000	932 Maple Street, Contoocook, NH 03229
McLane Cumberland	859-887-8200	1040 Baker Lane, Nicholasville, KY 40356
McLane Dothan	334-678-2700	100 McLane Parkway, Cottonwood, AL 36320
McLane High Plains	806-766-2900	1717 E. Loop 289, Lubbock, TX 79403
McLane Mid Atlantic	540-374-2000	56 McLane Drive, Fredericksburg, VA 22406
McLane Midwest	217-477-7500	3400 E. Main St., Danville, IL 61834
McLane Minnesota	507-664-3000	1111 West 5th Street, Northfield, MN 55057
McLane New Jersey	856-351-6200	742 Courses Landing Road, Carneys Point, NJ 08069

McLane Northeast	315-638-7500	2828 McLane Drive, Baldwinsville, NY 13027
McLane Northwest	253-512-1800	9611 45th Avenue SW Bldg. 4, Lakewood, WA 98499
McLane Pacific	209-725-2500	3876 E. Childs Avenue, Merced, CA 95341
McLane Pennsylvania	570-330-8400	43 Valley View Business Park, Jessup, PA 18434
McLane Southeast	706-357-9540	300 Hwy. 29 North, Athens, GA 30603
McLane Southern	601-833-6761	2104 E. Manufacturers Blvd., NE, Brookhaven, MS 39601
McLane So. California	909-887-7500	4472 Georgia Blvd., San Bernardino, CA 92407-1857
McLane, Southwest	254-770-2800	2828 Industrial Blvd., Temple, TX 76501
McLane Suneast	407-931-5200	1818 Poinciana Blvd., Kissimmee, FL 34758
McLane Sunwest	623-935-7500	14149 W. McDowell Rd., Goodyear, AZ 85395
McLane Western	303-682-7500	2100 East Ken Pratt Blvd., Longmont, CO 80504

REQUEST NO. 11:

For all Respondent facilities/locations nationwide during the relevant time period and with respect to any test or variation identified in #5 and #6 above, provide documents or a list of information identifying all persons by name, last known home address and telephone number, and social security number, who were:

a. terminated because of an inability to pass any test or variation,

b. reassignment and/or transferred because of an inability to pass any test or variation,

c. not hired because of any inability to pass any test or variation,

d. not promoted because of an inability to pass any test or variation.

RESPONSE TO REQUEST NO. 11:

Please refer to the response to request number nine.

REQUEST NO. 12:

For each person identified in 11(a) through 11(d), provide

a. date of termination, reassignment, transfer, not hired or not promoted,

b. name and title of the individual who made the decision to terminate, reassign, transfer, not hire and/or not promote the person based on test results.

RESPONSE TO REQUEST NO. 12:

Please refer to the response to request number nine.

REQUEST NO. 13:

For each test or variation identified in #5 or #6, provide any and all evidence which shows any change, whether a reduction or increase, in workplace injuries.

RESPONSE TO REQUEST NO. 13:

As a preliminary matter, it is unclear what type of evidence the EEOC is requesting in order to show a reduction or increase in workplace injuries. For this reason, the Company objects to this request due to its breadth, ambiguity and scope. Notwithstanding these objections, the Company is evaluating what information is available, if any, that may be responsive to this request, and if applicable, will provide a supplemental response. At this time, the Company objects to this request as unduly burdensome as it would require the Company to produce or create information, stored electronically or otherwise, in a medium or format other than that in which it is maintained in the normal course of business, and would require the production and indexing of extensive electronically stored information

and other documentation, the collection and production of which would seriously disrupt the Company's normal business operations and cause significant monetary expense to the company that would outweigh the probative value of such information.

REQUEST NO. 14:

During the relevant time period, if Respondent received any formal or informal complaints by any employee other than Charging Party concerning the test(s), or any claims of discrimination based on sex and/or disability, submit the following:

a. name and job title of each person who complained,

b. name and job title of each person receiving each complaint,

c. date of each complaint,

d. any and all formal and informal written record reflecting the complaint and the name and position title of the person who is subject of the complaint,

e. record of all actions taken by your organization in response to each complaint, including copies of all remedial actions taken.

RESPONSE TO REQUEST NO. 14:

The Company objects to this request to the extent that it seeks information related to any

and all claims based solely on sex and/or disability. Regarding disability discrimination, the EEOC confirmed that it was not alleging that Ms. Ochoa's pregnancy was a disability protected by the Americans with Disabilities Act. *See* Interview with T. Hatch, Recording at 7:00-7:06. Likewise, complaints that are related to gender but not regarding or related to the IPCS test are beyond the scope of Ms. Ochoa's Charge and would not be relevant or reasonably calculated to lead to the discovery of admissible evidence in any proceeding related to the allegations in the Charge. The following complaints were received from employees in the grocery division whom alleged discrimination based on the use of the IPCS test.

Name	Job Title	Division	Date of Complaint	Subject Matter	Actions Taken/Status
Steve Banda	Forklift	McLane Pacific	9/22/2010	IPCS + Disability Claim	File with CA DFEH (Charge No. E2010011C0202-00-pe); Pending
Claudia Santillan	Selector	McLane Pacific	2/4/2008	IPCS + Gender Claim	File with Fresno, CA EEOC (Charge No. 607-CV-1625); Settled for $3,468.00 on 11/7/2008
Patricia Norman	Palletizer	Southeast	1/11/2008	IPCS + Race Claim	File with Atlanta, GA EEOC (Charge No. 11A-2208-00059); EEOC dismissed charge
Dick Shahenian	Mechanic Contractor	Contractor with McLane Pacific	Feb, 2009	IPCS + Disability/ Age Claim	File with Fresno, CA EEOC (Charge No. 485-2009-00229); Settled during EEOC mediation for $4,160.00 on 8/2009

REQUEST NO. 15:

Provide a list of all individuals who applied for a position, for which the test identified in #5 and #6 above was in use, at any location or facility of Respondent during the relevant time period. Annotate the list by:

a. name

b. social security number

c. last known home address and telephone number

d. sex

e. medical condition

f. date of application

g. whether the applicant was hired, and date and reason for hire or non-hire

h. location at which they applied and

i. position for which they applied.

RESPONSE TO REQUEST NO. 15:

Please refer to the response to request number five.

REQUEST NO. 16:

Provide a list of all individuals who sought promotion or were selected for promotion to a position, for which the test identified in #5 and #6 above was in use,

at any and location or facility of Respondent during the relevant time period. Annotate the list by:

a. name

b. social security number

c. last known home address and telephone number

d. sex

e. medical condition

f. date promotion sought

g. whether the individual seeking promotion was selected and, if so, date and reason for selection or non-selection

h. location at which they sough [sic] promotion and position for which they sought promotion.

RESPONSE TO REQUEST NO. 16:

Please refer to the response to request number five.

REQUEST NO. 17:

Provide a list of all individuals who were employed by Respondent at any location or facility nationwide during the relevant time period. Provide a separate list of each facility/location nationwide and annotate the list by:

a. name

b. social security number

c. last known home address and telephone number

d. sex

e. medical condition(s)

f. date of hire

g. all position titles held

h. dates when each position title was held

i. termination date and reason, if applicable.

RESPONSE TO REQUEST NO. 17:

Please refer to the response to request number nine.

REQUEST NO. 18:

Provide a complete copy of Charging Party's personnel file, including but not limited to all documents relating to applications for employment, pay history and wages, job titles and job duties, work performance, evaluations, commendations, complaints made by her, complaints made about her, write-ups, warnings, counselings, disciplinary action, personnel action forms, communication logs, terminations, and reasons for separation or termination and Charging Party's medical file, including but not limited to test scores or results,

documentation from treating physicians, documentation from non-treating physicians, and medical or physical evaluations by Respondent's personnel.

RESPONSE TO REQUEST NO. 18:

The Company produced Charging Party's personnel file as Exhibit 55, and the confidential file as Exhibit 56, in response to the First RFI, dated November 13, 2009.

REQUEST NO. 19:

Provide complete copies of the personnel files, including but not limited to all documents relating to applications for employment, pay history and wages, job titles and job duties, work performance, evaluations, commendations, complaints made by him or her, complaints made about him or her, write-ups, warnings, counselings, disciplinary action, personnel action forms, communication logs, termination, and reasons for separation or termination for Bobby Carlson (President), Theresa Hatch (Human Resources Manager) and Janann Williams (Vice President, People).

RESPONSE TO REQUEST NO. 19:

The Company objects to the request for the personnel files of Bobby Carlson, Theresa Hatch, and Janann Williams on the grounds that it seeks information and/or documents that are not relevant to the Charge under investigation or any aspect of any Charging Party's current or former employment with the company, and

therefore is not reasonably calculated to lead to the discovery of admissible evidence in any proceeding related thereto the allegations in the Charge filed with the EEOC. Further, the production of Mr. Carlson's, Ms. Hatch's, and Ms. Williams' personnel files would require the Company to produce confidential information and/or documents concerning the Company's employees.

Sincerely,

SNELL & WILMER

/s/ Ashley Kasarjian

Joshua Woodard
Ashley Kasarjian

ATK:tt

[Doc. 9-1]

EXHIBIT 38

Snell & Wilmer
CCC L.L.P.CCC
LAW OFFICES

One Arizona Center
400 East Van Buren Street
Suite 1900
Phoenix, Arizona 85004-2202
602.382.6000
602.382.6070 (Fax)
www.swlaw.com

Ashley T. Kasarjian
602-382-6544
akasarjian@swlaw.com

DENVER
LAS VEGAS
LOS ANGELES
LOS CABOS
ORANGE COUNTY
PHOENIX
SALT LAKE CITY
TUCSON

April 1, 2011

VIA FAX: (602) 640-5071
AND HAND DELIVERY

Rayford O. Irvin
Equal Employment Opportunity Commission
District Director (Issuing Official)
3300 North Central Ave., Ste. 690
Phoenix, Arizona 85012

Re: Petition to Revoke Subpoena No. PHX-11-42
Damiana Ochoa v. McLane Sunwest
Charge No.: 548-2008-01093

Dear Mr. Irvin:

Pursuant to 29 C.F.R. § 1601.16, Respondents McLane Company, Inc. ("McLane") and McLane/Suneast,

Inc. ("McLane Sunwest")[1] petition the EEOC to revoke Subpoena No. PHX-11-42, dated March 25, 2011 (the "Second Subpoena")[2], in the matter of *Ochoa v. McLane Sunwest* (Charge No. 540-2008-01093). The Second Subpoena is issued pursuant to Title VII (42 U.S.C. § 2000e-9) and seeks "testimony regarding the above referenced charge of discrimination from the key decision maker(s) in the process that led to Respondent's implementation of the Industrial Physical Capability Strength Test (IPCS) and Isokinetic Physical Capability Test (IPCT) tests or variation of the IPCS and the IPCT tests for the Food Services Division." *See* Second Subpoena, attached as Exhibit A. Respondents submit this petition to request that the Second Subpoena be revoked in its entirety, as it seeks irrelevant information and Respondents already have complied with all reasonable requests. Of significance, the "food service division" is operationally distinct from Ms. Ochoa's employer, McLane/Suneast, Inc. d/b/a McLane Sunwest—a grocery facility. Accordingly, in a process entirely separate and independent from the grocery

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[1] The EEOC issued the current Subpoena to McLane Company, Inc. However, the underlying Charge of Discrimination filed by Ms. Damiana Ochoa was filed solely against her employer, McLane Sunwest. Accordingly, both McLane Company, Inc. and McLane Sunwest petition the EEOC to revoke the Subpoena.

[2] The EEOC notes on the Second Subpoena that counsel for McLane Sunwest was sent a copy; however, to date, counsel has not received a copy from the EEOC. As Respondents frequently have requested, Respondents again request that the EEOC direct all future correspondence through counsel, rather than serving the CEO and failing to provide notice to counsel.

division's decision to use the IPCS test for grocery operations, McLane Foodservices, Inc. ("Foodservices"), a separate corporation and different employer, independently decided to use the IPCS test for its own employees a year prior to the grocery division.

As noted in earlier correspondence and discussed more fully herein, Respondents have concerns with the relevance, breadth and scope of the Second Subpoena and other information sought in this investigation. Notwithstanding such concerns, Respondents have consistently expressed a willingness to cooperate with the EEOC and have made efforts to confer with EEOC officials at many levels. However, the EEOC has not engaged in any substantive discussions with Respondents nor acknowledged Respondents' requests to meet. Rather, the EEOC continues to request additional data and information in a manner that calls into question whether the requests are offered for a legitimate purpose or constitute an abuse of process. Respondents remain committed to engaging in such discussions and information sharing; however, the EEOC's issuance of the Second Subpoena necessitates this Petition.

I. FACTUAL AND PROCEDURAL BACKGROUND

A. Respondents McLane Company, Inc. and McLane Sunwest

McLane Company, Inc. is a supply chain services company, providing grocery supply chain solutions for

convenience stores, mass merchants, drug stores, and military locations throughout the United States. In addition to having several distinct operating locations, McLane also has a number of completely separate subsidiary companies.

McLane/Suneast, Inc., d/b/a McLane Sunwest, is a subsidiary of McLane that operates as a grocery distribution center in Goodyear, Arizona. Since opening in 1985, it has provided services to its customers located in Arizona, Nevada, New Mexico and Texas. McLane Sunwest has been, and remains, committed to developing dedicated, well-trained teams that are focused on excellence. As an equal opportunity employer, McLane Sunwest prohibits unlawful discrimination in every aspect of the employment relationship. Further, McLane Sunwest is committed to protecting the safety and health of all its employees.

B. Ms. Ochoa's Charge of Discrimination

Ms. Damiana Ochoa ("Ms. Ochoa") filed a Charge of Discrimination against McLane Sunwest on January 7, 2008 alleging that she was discriminated against because of her sex (female) and alleged disability (pregnancy).[3] In her charge of sex and disability discrimination, Ms. Ochoa alleged as follows:

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[3] EEOC Investigator Barbara Rusden confirmed during the interview of Ms. Theresa Hatch that the EEOC was not alleging that Ms. Ochoa's pregnancy was a disability protected by the ADA.

> On or about August 28, 2007, I began maternity leave. My doctor released me to return to work on or about October 31, 2007. I was advised by Stephanie (last name unknown), Human Resources, that before returning to work, I had to take an agility test (physical capability strength test.) On or about November 1, 2007, I took the test and did not pass. On or about November 19, 2007, and December 28, 2007, I retested and did not pass. I have worked for the above-named employer for over eight years as a cigarette selector.
>
> I believe I have been discriminated against because of my sex, female, (pregnancy) in violation of Title VII of the Civil Rights Act of 1964, as amended.
>
> The physical capability strength test is given to all employees returning to work from medical leave and all new hires, regardless of job position. I believe the test violates the Americans with Disabilities Act of 1990, as amended.

McLane Sunwest denies Ms. Ochoa's allegations in their entirety and provided the EEOC with evidence showing that she had not been discriminated against in any way. As explained in its position statement dated April 25, 2008, McLane Sunwest hired Ms. Ochoa as a Selector II/Mezzanine Selector. In this position, Ms. Ochoa was required to perform various physical tasks, such as: (1) pulling stacks of 25 empty totes to a staging area (which required up to 145 lbs. of force); (2) lifting totes off stacks and placing them on a

roller belt; (3) pushing/pulling totes up or down the roller belt; (4) stocking shelves; and (5) lifting/lowering/carrying/sliding 40 lb. wooden pallets. All physically demanding positions at McLane Sunwest are assigned either the "Medium," "Medium-Heavy" or "Heavy" category based upon the physical demands of the job requirements, as assessed by an independent ergonomic expert. Ms. Ochoa's position required "Medium-Heavy" lifting and physical exertion.

McLane and its subsidiaries take the safety of their employees seriously. Specifically, with regard to McLane Sunwest, in order to ensure that employees are capable of safely performing these physically demanding jobs, all newly hired employees, employees returning from an absence of thirty days or more, as well as individuals seeking a job that is more physically demanding than their current job, are required to take a physical capability exam known as the Industrial Physical Capability Strength Test (referred to as "PCE" or "IPCS test"). If an employee cannot meet the minimum strength requirement for the particular position, the employee may be given an opportunity to retest. During this time, the employee is encouraged to work to enhance his/her overall physical capability.

i. General Information Regarding IPCS Testing

Industrial Physical Capability Services, Inc. ("IPCS") oversees the testing in order to ensure objectivity, validity, and reliability. Over the past thirty

years, IPCS has provided its standardized capability assessments to numerous industrial clients in the trucking, distribution, airline, manufacturing and utility industries. Numerous comparative studies have evaluated the effectiveness of IPCS testing on the reduction in the frequency and severity of injuries. For example, in a 16-month analysis of new employees who were evaluated by IPCS testing, there was a 70.5% reduction in the incident rate of injury. In another study, 14 food distribution locations took part in a 35-month study that concluded that there was a dramatic impact on the reduction of the frequency and severity of injuries.

In order to match the physical capabilities of the worker to the physical demands of a particular job, a Job Task and Physical Activities Analysis is performed by an independent company that observes and analyzes the performance of the job duties. This analysis determines the target physical capability score required for each particular job. McLane Sunwest employees go to an approved clinic, with trained IPCS providers, to take the PCE. The PCE is performed on an isokinetic machine that focuses on the major muscle groups of the shoulders and legs, as strength in these two areas is necessary when performing the essential functions of these physically demanding jobs. The machine allows a dynamic evaluation of specific movement patterns and accommodates an individual's weaknesses and strengths by providing resistance equal to the force applied against the machine.

IPCS testing is critical at McLane Sunwest given the physically demanding nature of certain jobs. For example, a Selector II may pick approximately 2,300 pieces of product from racks to place in totes, filling 1,000 totes per shift.

ii. Ms. Ochoa's IPCS Testing

Ms. Ochoa requested and was granted FMLA leave for the birth of a child. Upon concluding her FMLA leave, she successfully completed the required "Return to Work" test and was promptly reinstated. In June 2007, Ms. Ochoa again requested and was granted FMLA leave for the birth of another child. Following the expiration of her second leave, Ms. Ochoa did not meet the minimum physical strength capability to safely perform the essential functions of her medium-heavy position—despite being given three separate chances at the physical capability examination. As a result of her third failure, IPCS concluded that she was unable to meet the minimum qualifications to perform the essential functions of her job. Because no alternative position existed at or below her strength capability, her employment was terminated on January 9, 2008.

iii. McLane Sunwest's Response to Ms. Ochoa's Charge

McLane Sunwest denies Ms. Ochoa's allegations in their entirety and has provided the EEOC with evidence showing that she had not been discriminated

against in any way. In response to Ms. Ochoa's Charge, McLane Sunwest submitted a position statement with 24 supporting exhibits on April 25, 2008. *See* Summary of Exhibits Produced, Exhibit B. In addition, in response to the EEOC's first Request for Information ("First RFI"), McLane Sunwest submitted a supplemental response and supporting exhibits 25-64 on November 13, 2009. McLane Sunwest also permitted the EEOC to conduct an on-site visit of the McLane Sunwest facility, and agreed to the interview of Theresa Hatch, Human Resources Manager, on March 9, 2010, and Janann Williams, Vice President, People, on August 5, 2010. As discussed in Section C below, McLane Sunwest also provided the EEOC with additional information and produced exhibits 65-75 (including various subparts) on January 14, 2011, in response to the EEOC request for information ("Second RFI").

Among the documents disclosed were policies and procedures related to the IPCS test, documents related to Ms. Ochoa's taking of the test and her IPCS test results, a breakdown of all IPCS test results from McLane Sunwest and related data regarding the employees taking the test, the job task analysis for Ms. Ochoa's position and for other positions at McLane Sunwest and within grocery operations, the documentation employees receive regarding the IPCS testing, physical demands and strength definitions, a validation study and injury analyses prepared by IPCS, opinion letters regarding the validity of the IPCS test, Ms.

Ochoa's entire personnel file, and documents explaining the IPCS test.

C. The EEOC's Expansion of Ms. Ochoa's Charge

Notwithstanding the voluminous documents and data produced relating to Ms. Ochoa's Charge, the EEOC has continued to request more information and documents. First, apparently to avoid the statutory limit to its ability to investigate Ms. Ochoa's Charge under Title VII, the EEOC simply added an additional charge number to its request for information relating to Ms. Ochoa's Charge and now claims to be investigating nationwide ADEA compliance. In doing so, the EEOC argues that the nationwide scope of its subpoena relating to Ms. Ochoa's Charge is justified. Thus, without an actual Charge of Discrimination, Charging Party, or Commissioner's Charge, the Phoenix office of the EEOC expanded the Ochoa sex discrimination investigation into an ADEA investigation of McLane Company, encompassing all related entities nationwide. Notably, Ms. Ochoa was not 40 years old or older at the time of her employment with McLane Sunwest, and would not have been afforded the protections of the Age Discrimination in Employment Act, as amended by the Older Workers Benefits Protection Act.

Moreover, although asked, EEOC Investigator Barbara Rusden stated that the EEOC was not willing

to explain the basis for this EEOC-initiated investigation or why it is warranted or justified. While the request for age-related data was removed from the request regarding Ms. Ochoa's Charge—it remains on the "separate" ADEA Charge—and the EEOC has continued to assert that it is expanding the scope of its investigation of Ms. Ochoa's Charge nationwide, despite the fact that the Company is comprised of operationally-distinct divisions and/or entities.

In a letter dated September 3, 2010, McLane made clear that it was willing to cooperate with any reasonable investigation conducted by the EEOC, but pointed out that the EEOC never provided McLane a copy of the purported new Charge or any other notice of the purported ADEA allegations warranting an expanded "nationwide investigation" of ADEA compliance. McLane explained that it could not begin to analyze the EEOC's extensive requests for information without such notice. McLane also raised concerns with the intermingling of this purported new ADEA Charge and Ms. Ochoa's Charge and the suspicious timing of the request, following objections to the investigation exceeding the scope authorized by Title VII. McLane asked the EEOC for some explanation of the basis for investigating ADEA compliance, including requesting a copy of the Charge referenced. McLane also expressed its willingness to cooperate and requested clarification as to the EEOC's significant request by correspondence dated December 7, 2010, telephonically during a conversation with Ms. Rusden on January 12, 2011, and again, on January 19, 2011.

At the same time the EEOC initiated the ADEA investigation, the agency sent identical requests for information requesting nationwide information from all facilities and subsidiaries of McLane relating to claims of gender and disability discrimination. Ms. Rusden subsequently apologized for intermingling the two requests, and then, sent two nearly identical requests to Respondents. Accordingly, McLane Sunwest responded to the EEOC's amended Second RFI and provided additional documentation relating to McLane Sunwest and other grocery operations. McLane Sunwest further objected to any further expansion of nationwide data, as any requests for information relating to Foodservices would not be relevant to Ms. Ochoa's employment or allegations and could not have arisen from Ms. Ochoa's Charge.

On February 15, 2011, the EEOC issued Subpoena No. PHX-11-32 ("First Subpoena") requesting 18 categories with 79 subparts of documents and information relating to the matter of *Ochoa v. McLane Sunwest*. Respondents filed their Petition to Revoke Subpoena No. PHX-11-32 on February 22, 2011 ("First Petition"), and explained that many responsive documents had already been produced and reiterated their concerns regarding the breadth and scope of the First Subpoena and information sought. Further, Respondents expressed their commitment to engaging in good faith discussions and information sharing. Of significance, the expansive requests for information were nearly identical (even after their revision) to the subpoena issued regarding the ADEA investigation.

The EEOC has not made a determination relating to the First Petition. *See* 29 C.F.R. § 1601.16(b)(2) ("Within eight calendar days after receipt or as soon as practicable, the General Counsel or Director, as appropriate, shall either grant the petition to revoke or modify in its entirety or make a proposed determination on the petition, stating reasons, and submit the petition and proposed determination to the Commission for its review and final determination."). Rather than address the merits of the First Petition, the EEOC issued its Second Subpoena. It is unclear why the EEOC has failed to respond to Respondents' objections set forth in the First Petition, but rather, continues to seek irrelevant and overbroad information in what appears to be an abuse of process.

D. The Second Subpoena and the EEOC's Continued Expansion of Ms. Ochoa's Charge

The EEOC issued the Second Subpoena on March 25, 2011, seeking "testimony regarding the above referenced charge of discrimination from the key decision maker(s) in the process that led to Respondent's implementation of the Industrial Physical Capability Strength Test (IPCS) and Isokinetic Physical Capability Test (IPCT) tests or variation of the IPCS and the IPCT tests for the Food Services Division," a corporation that is operationally distinct from Ms. Ochoa's employer, a grocery operation. On the same date, the EEOC issued an identical subpoena to McLane Company ("Second ADEA Subpoena"), pursuant to the

ADEA (29 U.S.C. § 626(a)) requesting exactly the same testimony. *See* Second ADEA Subpoena, Exhibit C.[4]

For the second time, the EEOC has issued a nearly identical subpoena relating to the ADEA investigation. As discussed in McLane's correspondence dated September 3, 2010 and January 14, 2011, and the Petition to Revoke dated February 22, 2011, Respondents are concerned with the intermingling and timing of the requests for documents, information and testimony in Ms. Ochoa's matter and the new EEOC initiated investigation regarding the ADEA. *See, e.g.*, *EEOC v. Bashas*, 2009 WL 3241763 (D. Ariz. Sept. 30, 2009) (discussing the issuance of a subpoena for harassment or ulterior motives). Now, the Second Subpoena contains identical requests for testimony relating to the implementation of the IPCS and IPCT testing in the "food services division." The continued intermingling Ms. Ochoa's Charge and the purported ADEA Charge seems to be another tactic employed by the EEOC to expand the Ochoa investigation beyond what is statutorily authorized under Title VII and harass Respondents, despite Respondents' production of voluminous documents, making available individuals from management for the EEOC to interview, offering an on-site

[4] The only issue for consideration as to this petition is the expansion of Ms. Ochoa's Charge, as the Subpoena issued relating to the ADEA investigation will be addressed in separate correspondence by Morgan, Lewis & Bockius LLP, on behalf of McLane Company, Inc. However, the Second ADEA Subpoena is offered as an attachment to this petition due to the Respondents' concerns regarding the intermingling of the investigations.

visit of McLane Sunwest, and—for over three years—reasonably complying with the EEOC's requests.

McLane Sunwest would be open to any suggestions from the EEOC if the EEOC believes there is a better test than the IPCS test to protect employees who work in physically-demanding jobs. However, Respondents have no indication that any other option exists that better protects its employees against workplace injuries so they can safely perform their jobs. Nor have Respondents been provided any indication that any other test can do so in such an objective and independent manner that is also job related and consistent with business necessity. In an effort to *protect* its employees from injuries, Respondents have been penalized by the EEOC through the continuous barrage of burdensome and irrelevant requests relating to this testing, while the EEOC has refused to engage in any meaningful discussion to get to the crux of the issue—the validity of the IPCS test.

II. OBJECTIONS TO THE SECOND SUBPOENA

The Second Subpoena is objectionable as it exceeds the scope of Ms. Ochoa's Charge and seeks evidence that is not relevant or material to the investigation, as Foodservices is a separate company from Ms. Ochoa's employer, McLane Sunwest, a grocery operation. Moreover, McLane Sunwest has

already provided the EEOC with a substantial volume of data, information and documents.[5]

A. The Testimony Sought is Outside the Scope of Ms. Ochoa's Charge and Does Not Seek Evidence Relevant or Material to the Investigation

Respondents object to the expansion of the investigation outside the scope of the underlying Charge into a separate entity in which Charging Party was not even employed. An investigation into all McLane entities is overly broad, unduly burdensome, and seeks information that is not relevant to the underlying

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[5] While the Second Subpoena is addressed to Mr. Grady Rosier, President/CEO of McLane and states "YOU ARE HEREBY REQUIRED AND DIRECTED" to testify, Ms. Rusden confirmed via voicemail on March 31, 2011 that the EEOC was not seeking to interview Mr. Rosier. Rather, the EEOC was seeking to interview the individual(s) most knowledgeable about when the IPCS test was first used at any McLane facility. Accordingly, while an objection specifically to the subpoena of Mr. Rosier does not appear necessary at this time, Respondents reserve the right to object to Mr. Rosier's interview/deposition. *See, e.g.*, *Liberty Mut. Ins. Co. v. Superior Court of San Mateo County*, 13 Cal.Rptr.2d 363, 367-68 (App. 1992) ("[I]t amounts to an abuse of discretion to withhold a protective order when a plaintiff seeks to depose a corporate president, or corporate officer at the apex of the corporate hierarchy, absent a reasonable indication of the officer's personal knowledge of the case and absent exhaustion of less-intrusive discovery methods."); *Baine v. General Motors Corp.*, 141 F.R.D. 332 (M.D. Ala. 1991) (granting a protective order for the deposition of an automobile manufacturer executive because no showing was made of unique personal knowledge, and no effort was made to exhaust less-intrusive discovery methods).

Charge of Discrimination. *See, e.g.*, *E.E.O.C. v. Quantum Foods, LLC*, 2010 U.S. Dist. LEXIS 41846, *12-14 (N.D. Ill. Apr. 26, 2010) ("[A]n investigation extending to Quantum's other facilities at this time would amount to a 'fishing expedition.'").

The employees in Foodservices are not similarly situated to the employees at McLane Sunwest, the grocery operation in which Ms. Ochoa was employed. In addition to the fact that the separate McLane facilities are independent centers, Foodservices is a separate and distinct company operationally. As Ms. Janann Williams explained during her August 5, 2010 interview, the decision to use the IPCS test in the grocery division was made independently of the decision to use the IPCS test in Foodservices. Ms. Williams further noted that each division had its own Job Task Analyses prepared. Accordingly, the prior actions of Foodservices are not the subject of or related to Ms. Ochoa's Charge. Ms. Ochoa was never employed by Foodservices, and none of her allegations relate to the food service distribution centers. The EEOC's request, seeking information and documentation from a distinct company and distinct operations of McLane Company, Inc. could not fairly or accurately be argued to have arisen from the EEOC's investigation of Ms. Ochoa's Charge.

Moreover, by email to Ms. Rusden dated September 21, 2010, it was explained that Foodservices made the decision to use the IPCS test in fall of 2003, and the actual testing began in January 2004. Separate and apart from the decision by Foodservices, the grocery division started discussing the IPCS test in the

fall of 2004, with actual testing beginning in March 2005. Testimony regarding the decision to implement the test by Foodservices in 2003 could not even arguably be related to Ms. Ochoa's Charge filed in 2008. Beyond the timing, the issues considered and the history of a test in a different company, with different operational needs and different employment demands, has no relevance to the selection and application of the IPCS test at McLane Sunwest.

Accordingly, the testimony sought is not relevant to the Charge under investigation or any aspect of any Ms. Ochoa's employment with McLane Sunwest and/or the validity of the IPCS test, and therefore is overbroad and not reasonably calculated to lead to the discovery of admissible evidence in any proceeding related thereto the allegations in the Charge.

B. Respondents' Cooperation with the EEOC and its Investigation

McLane Sunwest has cooperated with the EEOC and its investigation of Ms. Ochoa's Charge, and is willing to continue complying with the agency's requests for information, to the extent they are reasonable and within the agency's statutory authority. Moreover, as reiterated on multiple occasions, Respondents have been and remain willing to provide information to allow the EEOC to analyze the validity of the IPCS test in order to avoid the burden and expense of production of the vast amount of information sought on a nationwide basis.

Notably, McLane Sunwest has already produced 75 exhibits, many with subparts, in response to Ms. Ochoa's Charge and the EEOC's requests for information. Included in its production, McLane Sunwest has provided specific data regarding the IPCS testing at its location. In particular, the EEOC was provided with an excel file containing the employees' gender, test date, test reason, job class, job target, whether the employee met the minimum requirements of the position he or she was testing for, and the level he or she met.

As illustrated by McLane Sunwest's previous responses to the EEOC's requests for information, Respondents are committed to working with the EEOC to provide relevant information and to further produce relevant information in a less burdensome procedure. However, the scope of the Second Subpoena is particularly troublesome—especially given that the EEOC has (1) not analyzed the validity of the test which could render moot the need for much of the information sought in the Subpoena; (2) not acknowledged or responded to Respondents' request to meet regarding the EEOC's requests and information gathering; and (3) not even addressed Respondents' First Petition.

III. CONCLUSION

As demonstrated in the information and interviews provided to date, the employees of Foodservices are not similarly situated to Ms. Ochoa—or any other employee in the grocery division. Further, the decision

to use the IPCS test in Foodservices was made independently of the decision relating to grocery operations. Accordingly, Respondents do not believe that the request—seeking testimony relating to a distinct company—can fairly or accurately be argued to have arisen from the EEOC's investigation of Ms. Ochoa's Charge.

Throughout its investigation, the EEOC has sought information beyond what is relevant to Ms. Ochoa's allegations. Although Ms. Ochoa alleged only gender and disability discrimination relating to her attempt to return to work at McLane Sunwest, the EEOC has sought broad nationwide, company-wide information regarding all facilities, business divisions, and related entities far beyond Ms. Ochoa's allegations. The Company is willing to carefully evaluate any reasonable request for information relevant to Ms. Ochoa's Charge. However, the Company respectfully objects to the EEOC's Second Subpoena, attempting to expand the investigation outside the scope of the underlying Charge into a separate corporation in which Charging Party was not even employed. For the foregoing reasons, Respondents respectfully request that the Second Subpoena be revoked.

Sincerely,

SNELL & WILMER

/s/ Ashley Kasarjian
Joshua R. Woodard
Ashley T. Kasarjian

MORGAN, LEWIS &
BOCKIUS L.L.P.

/s/ Ellen Perlioni/with permission
Ronald E. Manthey
Ellen L. Perlioni

cc: Barbara Rusden
EEOC, Investigator
3300 North Central Ave., Ste. 690
Phoenix, Arizona 85012
Barbara.Rusden@EEOC.gov

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* * *

[Doc. 9-2]

EXHIBIT 41

Snell & Wilmer
CCC L.L.P.CCC
LAW OFFICES

One Arizona Center
400 East Van Buren Street
Suite 1900
Phoenix, Arizona 85004-2202
602.382.6000
602.382.6070 (Fax)
www.swlaw.com

Ashley Kasarjian
602-382-6544
akasarjian@swlaw.com

DENVER
LAS VEGAS
LOS ANGELES
LOS CABOS
ORANGE COUNTY
PHOENIX
SALT LAKE CITY
TUCSON

December 22, 2011

Meenoo Chahbazi
U.S. Equal Employment Opportunity Commission
Phoenix District Office
3300 N. Central Avenue, Suite 690
Phoenix, Arizona 85012-2504

Re: *Ochoa v. McLane Sunwest, Inc., Charge No: 540-2008-01093*

Dear Ms. Chahbazi:

Respondent McLane/Suneast, Inc. ("McLane Sunwest" or the "Company") hereby supplements its December 6, 2011 response to the EEOC's November 2, 2011 correspondence. The Company has expended a significant amount of time and effort and has devoted a significant amount of resources to ensure that it is providing as accurate and complete information as possible. The Company has responded to the EEOC's comments below and trusts that this will assist with informally resolving some or all of our disputes. The Company is still working diligently to address the remaining requests, and will supplement this response as reasonably as possible.

Please note that all responses, objections and other defenses identified in McLane Sunwest's previous correspondence, including but not limited to the petitions to revoke, dated February 22, 2011 and April 1, 2011, even if not specifically stated below, are hereby incorporated by this reference.

I. Subpoena for Documents

3. McLane Sunwest: Please refer to McLane Sunwest's response on December 6, 2011.

5b. Provide documents which reflect the name of each test's or variation's author or creator; the original publication or creation date of the test or variation; and the jobs, employer, or industry for which the test or variation was originally designed,

EEOC Response: Respondent has provided some information in response to this request, however, the information is incomplete. Documentation has been provided (e.g, an addendum contained in Exhibit 28) noting that the two associated appendices (dated June 5, 1999 and July 2, 1998) contain validation studies that were used to establish the IPCS cut-off scores for Medium, Heavy and Very Heavy. These studies were conducted on behalf of American Airlines. Based on the information provided, it is not clear whether the IPCS PCE was originally developed for use with material handlers in the airline industry. The Commission requests that Respondent provide documents clarifying the creation date of the test and the employer or industry for which the test was originally designed. Additionally, the Commission requests that Respondent provide information about how the IPCS test was developed and used for food services.

McLane Sunwest: It is the Company's understanding that a validation study was conducted in collaboration with American Airlines. McLane

Sunwest, however, does not believe that the IPCS PCE was developed exclusively for use with material handlers in the airline industry. It is the Company's understanding that the IPCS PCE was developed for use in a wide variety of industries with positions correlating to the physical capability categories developed by the Department of Labor. McLane Sunwest cannot independently corroborate the creation date for the IPCS PCE. Based on the literature provided by IPCS, Dr. Thomas Gilliam founded IPCS in August, 1998, and the IPCS test has been validated several times since its development.

McLane Sunwest objects to the EEOC's request for information relating to McLane Foodservices, Inc. ("Foodservices"), a separate company from Ms. Ochoa's employer, McLane Sunwest (a grocery operation), as such a request is not relevant to Ms. Ochoa's employment or allegations and could not have arisen from Ms. Ochoa's Charge.

Aside from the information provided above and in the documents produced to date, McLane Sunwest does not have any information as to Dr. Gilliam's other clients or industries serviced.

5c. Provide documents which describe the process that led to Respondent's implementation of each test or variation, including the names and titles of all key decision makers involved in the

process. Include copies of all correspondence, including e-mails exchanged, relating to the decision to implement the test at each of Respondent's locations. Include copies of any and all documents reviewed by any key decision makers in addition to paragraph 6 below,

EEOC Response: Respondent's current response is incomplete. Janann Williams, Vice President of People, indicated during an interview with the EEOC that a committee (which she stated consisted of herself, Jose Mirales [sic] (Risk Manager), Jim Sanders (Regional Vice President), Jim Trent (Regional Vice President), Mike Youngblood (President of Grocery Division), Dave Testro (Regional Vice President)) was responsible for the decision to implement the test, a process that she notes included "meetings, phone calls, letters" and involved a "back and forth" between the committee and Dr. Thomas Gilliam.

The Commission requests that Respondent provide clarification as to who was on this committee, and provide copies of associated correspondence (e.g., email, memoranda, etc.) among committee members and with the committee and Dr. Gilliam, other employees of IPCS, and any other individuals or organizations consulted in the committee's deliberative efforts concerning the implementation of the IPCS PCE.

McLane Sunwest: As noted, Ms. Janann Williams met with EEOC representatives to discuss the decision to utilize and implement the IPCS PCE. While the phrase "committee" has been

generally used, please note that there was no formal "committee" established to evaluate the IPCS PCE. Rather, certain individuals were consulted as the grocery division was deciding whether to implement the IPCS PCE.

Additionally please refer to the documents attached as Exhibit 77 regarding the IPCS PCE. McLane Sunwest is in the process of determining if there are any additional documents responsive to this request, and will supplement this response accordingly.

5d. Provide documents which reflect the effective dates of use of each test or variation at each of Respondent's locations.

EEOC Response: The Commission has not received information responsive to the request concerning the dates at which the test was implemented for hiring, promotion, transfer or return-to-work for each position at each location. Please provide the date that IPCS PCE was implemented for each position at each of Respondent's locations.

McLane Sunwest: Please refer to McLane Sunwest's response on December 6, 2011. Additionally, the EEOC has requested dates specific to hiring, promotion, transfer, or return-to-work for each location. To clarify, once the IPCE [sic] **PCE was implemented at a location, it applied to all new hires, all employees seeking an alternative position that had greater minimum strength requirements, and all employees returning from**

a leave of absence of 30 days or more-assuming the position was physically demanding such that the IPCS PCE was required. The Company is unaware of information that suggests implementation dates differed for new hire testing versus other types of testing.

5f. Provide documents which reflect a description of how each test or variation is administered and scored. Include documents which reflect a description of each stage of the process (e.g., application process if the test is used in an employee selection context; or process by which employees are deemed eligible to return to work if the test is required of employees returning to work after an extended leave), the point at which the test is administered in this process, the physical setting in which the test is administered, and the name and position of the person(s) who administer and score the test(s).

EEOC Response: The information provided by Respondent in response to this request is incomplete. The documentation (e.g. Exhibit 26 and Exhibit 28) provided by Respondent references several pieces of information that contribute to the final ICPS [sic] *PCE score, e.g., peak torque, body symmetry ratio scores, force curve analysis and body weight. The documentation provided indicates that these measures are "applied to a validated mathematical model, which generates the IPCS physical capability index score" (Exhibit 26), and that "the data [are] combined using a mathematical*

model to generate a single digit physical capability score" (Exhibit 28).

However, no responsive documents have been provided explaining how these various measures are combined to arrive at a final score, and no responsive documents or information has been provided concerning the details of the mathematical model. Understanding the IPCS score and how it is used requires understanding the details of how it is calculated.

Provide documents describing the process by which the measurements obtained in the Industrial Physical Capability Services, Inc. (IPCS) physical capability evaluation (PCE) (e.g, peak torque, body symmetry ratio scores, force curve analysis, body weight, etc.) are combined to arrive at the final IPCS physical capability index score—i.e., the "validated mathematical model, which generates the IPCS physical capability index score" referenced in "The IPCS Score—What Is It?" (Exhibit 26). The documents and information provided should include details explaining how each measurement obtained is combined with other measurements to arrive at the "final absolute score" referenced in "The IPCS Score—What Is It?", and how this "final absolute score" is used to arrive at the IPCS physical capability index score. Include any available documentation (e.g, technical documentation developed by IPCS or Respondent, etc.) that details the process.

McLane Sunwest: McLane has provided substantial documents and information relating to the IPCS PCE. As explained previously and in

documents provided, to calculate the IPCS score from the isokinetic evaluation, the following measurements are necessary:

- Peak Torque—how many foot pounds of torque are generated during each major movement pattern (*i.e.*, knee flexion/extension and shoulder flexion/extension).

- Body Symmetry ratio scores—the relationship of various body segments is critical to the worker performing the essential functions of the job safely. Specifically, the relationship of the shoulder flexors to the shoulder extensors, knee flexors to the knee extensors, right to left comparisons for the flexors and extensors for the shoulder and knee. In addition, the upper strength relative to the lower body strength is determined.

- Force curve analysis—each major set of force curves is objectively evaluated for normalcy. The score ranges from 0.0 to 1.0 where 0.0 is a flat line curve (no force generated) to a perfect shaped curve, which is a 1.0. The force curve is not determined by age or gender. Perfect force curves can be generated by young and old or male and female.

- Body weight—body weight is divided into the final absolute score. Body weight is used to make sure the force generated is adequate to not only support an individual's body weight but also to safely perform the essential functions of the job. This means that a

person who weighs 250 pounds needs to generate more torque that [sic] **a person who weighs 150 pounds.**

The body weight factor also has the effect of neutralizing differences between genders since (generally) most females weigh less than males.

These measurements are then applied to a "validated mathematical model," which generates the IPCS physical capability index score. It is the Company's understanding that this mathematical formula is considered highly confidential and proprietary to Industrial Physical Capability Services, Inc. McLane Sunwest does not know and cannot provide the mathematical formula.

McLane Sunwest has the following understanding of the IPCS PCE. This general summary is not intended to be a technical analysis of the IPCS PCE but, rather, is provided by McLane Sunwest in an attempt to identify as much information within its possession as possible to respond to the EEOC's request.

IPCS uses isokinetic machines to perform strength testing. The term "isokinetic" refers to a certain type of evaluation. There are several different machines that perform isokinetic evaluations. IPCS uses either a Biodex machine or a Cybex machine. An isokinetic machine has a dynamometer that the individual works against to generate force. The machine will reciprocate,

equal to the amount of force applied to the lever arm.

IPCS has providers around the country that conduct physical capability evaluations for IPCS. The clinician who administers the PCE for IPCS is a physical therapist, physical therapist assistant, or certified athletic trainer who has demonstrated that he/she can administer an isokinetic evaluation. These clinicians administer the isokinetic evaluation according to IPCS protocol, which is a standard protocol found in any isokinetic manual, and they submit the results to IPCS for data interpretation. The providers who perform the isokinetic evaluations do so on a day-to-day basis and are familiar with the equipment and how to use it.

The major leg muscle groups that IPCS measures are the knee flexors and knee extensors. The knee flexors, for the most part, are the hamstring muscles located in the back of the thigh. The knee extensors are the quadriceps muscles which primarily are located in the front of the thigh. When an individual is sitting on a bench, his or her knee is flexed at 90 degrees. Knee extension is the process of extending the knee or straightening out the leg so that it is parallel to the ground. Knee flexors are the muscles used when bringing the knee back to flex position, or the 90 degree position, where the individual started.

IPCS measures the muscle groups of the shoulders including the shoulder flexors and the shoulder extensors. The movement patterns that are evaluated are the shoulder flexion and the shoulder extension. The IPCS measurement of the shoulder flexor does not include just a single muscle but, rather, the strength of approximately a dozen muscles. This group of muscles is critical to performing the shoulder flexion movement. Shoulder flexion refers to the process of moving the arm from down at the side to straight in front of an individual to approximately ear height. Shoulder extension refers to the process of returning the arm back down to the starting position.

One advantage of the isokinetic evaluation is that it takes resistance into account. The isokinetic machine provides resistance equal to the amount of force put into the machine. IPCS factors in body weight to neutralize differences in body size. IPCS does not use BMI in calculations. The computer analysis consists of evaluating, measuring and rating the force curves to identify the amount of torque. Through a proprietary mathematical model that Dr. Gilliam created, the IPCS PCE looks at a variety of muscle symmetry scores (*i.e.*, how does the right shoulder flexor compare to the left shoulder flexor). The force curves are factored in as part of the interpretive process, and then the final score is generated. It is compared against the target score

that was established through the job task analysis. If the score is below the target score, the person has not met the essential functions of the job for which he or she tested. If the score is equal to or above the target score, the person has met the essential functions of the job for which he or she tested.

IPCS' evaluations typically include two sets of force curves that include five repetitions in each set. The data is submitted to IPCS and entered into its proprietary software package. IPCS then reproduces the force curves and performs its own unique analysis.

The analysis is based on the data taken from the force curves and shows what the force curves look like and whether there are any muscle symmetries. This gets factored into IPCS' proprietary equation. All the data points (*e.g.*, there are thousands of data points for each curve) are entered into the system. The data curves are reproduced and then analyzed by IPCS' proprietary software package.

IPCS performs two concentric contractions. One is a shoulder flexion where the shoulder flexors contract and the other is a concentric contraction that occurs when the shoulder extensors bring the arm back down. IPCS' proprietary analysis of the force curve is computerized and the force curve analysis will rate the curves

from zero to one, one being a perfect curve. Zero is flat-line and generates no torque.

The analysis results in a final score which is compared to the target score established for the position. In other words, it shows whether an employee is able to safely perform the essential functions of the job for which he or she tested. The range of IPCS scores that constitute medium-heavy, for example, is from an IPCS score of 1.32 to an IPCS score of 1.55 (as reflected in the chart below). Force curves and muscle symmetry scores, divided by body weight, provide the range. IPCS relates this back to this correlation analysis performed based on injury history specific to the Department of Labor's strength definitions.

IPCS has been able to determine that when a person works in a certain range, such as the medium-heavy range, based on the measurements of the Department of Labor's strength definitions, the person who scored in the medium-heavy range was likely able to safely perform the essential job functions. Those persons who did not, (*i.e.*, those who scored below the applicable strength definitions but nevertheless attempted to work in that medium-heavy range) were at a substantial risk of being injured and/or putting their coworkers at risk.

The DOL physical capability category is determined through the job task analysis prepared

by GMSI. The following chart summarizes the physical demand categories and corresponding IPCS score:

Less than Sedentary		Exerting up to 5 pounds of force occasionally (activity or condition exists up to 1/3 of the time), and/or a negligible amount of force frequently (activity or condition exists from 1/3 to 2/3 of the time) to move objects.
Sedentary	.2522	Exerting up to 10 pounds of force occasionally (activity or condition exists up to 1/3 of the time), and/or a negligible amount of force frequently (activity or condition exists from 1/3 to 2/3 of the time) to move objects.
Light	0.59	Exerting up to 15 pounds of force occasionally (activity or condition exists up to 1/3 of the time), and/or up to 5 pounds of force frequently (activity or condition exists from 1/3 to 2/3 of the time), and/or a negligible amount of force constantly to move objects.

Light-Medium	**0.83**	**Exerting 15 to 20 pounds of force occasionally (activity or condition exists up to 1/3 of the time), and/or 5 to 10 pounds of force frequently (activity or condition exists from 1/3 to 2/3 of the time), and/or greater than negligible up to 5 pounds of force constantly to move objects.**
Medium	**1.08**	**Exerting 20 to 35 pounds of force occasionally (activity or condition exists up to 1/3 of the time), and/or 10 to 15 pounds of force frequently (activity or condition exists from 1/3 to 2/3 of the time), and/or greater than negligible up to 10 pounds of force constantly to move objects.**
Medium-Heavy	**1.32**	**Exerting 35 to 50 pounds of force occasionally (activity or condition exists up to 1/3 of the time), and/or 15 to 25 pounds of force frequently (activity or condition exists from 1/3 to 2/3 of the time), and/or 10 pounds of force constantly to move objects.**

Heavy	**1.56**	**Exerting 50 to 75 pounds of force occasionally (activity or condition exists up to 1/3 of the time), and/or 25 to 40 pounds of force frequently (activity or condition exists from 1/3 to 2/3 of the time), and/or 10 to 15 pounds of force constantly to move objects.**
Heavy-Very Heavy	**2.00**	**Exerting 75 to 100 pounds of force occasionally (activity or condition exists up to 1/3 of the time), and/or 40 to 50 pounds of force frequently (activity or condition exists from 1/3 to 2/3 of the time), and/or 15 to 20 pounds of force constantly to move objects.**
Very Heavy	**2.43**	**Exerting in excess of 100 pounds of force occasionally (activity or condition exists up to 1/3 of the time), and/or in excess of 50 pounds of force frequently (activity or condition exists from 1/3 to 2/3 of the time), and/or in excess of 20 pounds of force constantly to move objects.**

It is the Company's understanding that IPCS developed the scoring through analysis of employees performing the type of work described in the physical capability rating, and that the mathematical formula utilized to determine the physical capability score is considered highly confidential and proprietary to Industrial Physical Capability Services, Inc. McLane Sunwest does not know and cannot provide the mathematical formula. For additional information, please refer to the documents attached as Exhibit 78.

These are the facilities currently being utilized to perform the IPCS PCE in the grocery division:

Division	IPCS PCE Facility
Carolina	Nash Day Hospital Outpatient Rehab Services, 2450 Curtis Ellis Drive, Rocky Mount, NC 27804
Concord	Professional Physical Therapy, 25 Hall Street, Suite 201, Concord, NH 03301
Cumberland	Urgent Treatment Clinic, 204 Bellaire Drive, Nicholosville, KY 40356
High Plains	OccMed Associates, 25 Briercroft Office Park, Lubbock, TX 79412
Mid Atlantic	On Site Facility, 10514 Wakeman Drive, Fredericksburg VA, 22407
Midwest	Pro PT, 3815 N. Vermillion Street, Danville, IL 61836
Minnesota	CSMR, 1381 Jefferson Road, Northfield, MN 55057

Ozark	St. Johns Urgent Care, 2120 West Carney, Springfield, MO 65803
New Jersey	Riverfront Medical Center, 510 Heron Drive, Swedesboro, NJ 08085
Northeast	Onondaga Physical Therapy, 7687 Frontage Road, Cicero, NY 13039
Northwest	Apple Physical Therapy, 3912 10th ST SE #101, Puyallup, WA 98374
Pacific	Yosemite Physical Therapy, 786 Loughborough Dr, Merced, CA 95348
Pennsylvania	Northeastern Occupational Medicine & Rehabilitation Center P.C., 769 Keystone Industrial Park, Dunmore PA. 18512
Southeast	Athens Regional Medical Center, 1199 Prince Ave., Athens, GA 30606
Southern	Physiotherapy Associates, 631 Brookway Blvd., Brookhaven, MS 39601
So. California	Central Occupational Medicine Providers, 4300 Central Ave, Riverside, CA 92506
Southwest	Select Physical Therapy, 1616 Azalea Drive, Temple, TX 76502
Suneast	Select Physical Therapy, 501 East Oak Street, Kissimmee, FL 34744
	Select Physical Therapy, 6000 Turkey Lake Road, Orlando, FL 32819
Sunwest	West Valley Rehab, 13460 N. 94th Drive, Suite G-1 Medical Center 2, Peoria, AZ
Western	The Therapy Center, 1330 Sunset Street, Longmont, CO 80501

5i. For each job or job classification for which a test or variation is used, provide documents which identify the score(s) that are considered "passing" and "failing", or any other rating classification used, provide documents which reflect the details on the process by which any scoring/classification system was established, and provide documents which reflect the details about the process by which Respondent determined the minimum score considered "passing."

EEOC Response: The documentation provided by Respondent relating to this request is incomplete. The documentation provided (Exhibit 8) includes physical demand strength definitions associated with each final IPCS target/cutoff score, but does not provide explanation of how each cutoff score was established given the strength definitions. Although the documents referenced in Exhibit 28 and the two associated appendices purport to provide information on how the IPCS cut-off scores for Medium, Heavy and Very Heavy strength designations were established, this information does not provide adequate explanation of the processes associated with the establishment of these cut-off scores, nor does this documentation provide information on how cut-off scores were established for the remaining strength designations utilized by Respondent (e.g, Medium-Heavy).

As a related issue, documentation (e.g, Exhibit 17, sample IPCS score report) suggests that there are minimum scores associated with total torque measures, total torque measures divided by body weight, IPCS

scores, and IPCS scores divided by body weight. However, no information has been provided on how these minimum scores were established for each measure. Understanding the IPCS score and how it is used requires understanding how the minimum score criteria were established. Provide documents that explain how the minimum score criteria were established for each measure, including the IPCS score as well as any score or measure that is used to calculate the IPCS score.

McLane Sunwest; Please refer to the Response to 5(f).

5k. Provide copies of any and all adverse impact studies performed for each test or variation.

EEOC Response: It is our understanding that Respondent did not conduct any adverse impact studies for the IPCS test. Please confirm that Respondent did not conduct any adverse impact studies or produce any responsive documents to this request.

McLane Sunwest: As previously advised, McLane Sunwest and/or the grocery division has not conducted any adverse impact studies, nor is it aware of any adverse impact studies and, therefore, has not produced any documents responsive to this request.

7. For all positions at Respondent's facilities/locations nationwide for which any test or variation identified in #4 and #5 above is used,

provide a copy of the Job Task Analysis for each position.

EEOC Response: There are several positions for which job task analyses have not been provided. Provide job task analyses for all positions for which the IPCS test is used, including any positions identified in (5g), above. Additionally, Respondent has not provided job task analyses for positions in food services. Please also provide job task analyses for all food service positions for which the IPCS test is used.

McLane Sunwest: McLane Sunwest has previously produced Job Task Analyses. The updated set of Job Task Analyses is produced as Exhibit 79. We are working on confirming whether additional JTAs exist for grocery positions and we will supplement if necessary and as reasonably possible.

8. For January 1, 2006 to the present date, provide documents or a listing of information identifying all persons who took any test or variation identified in #4 and #5 in connection with employment at any of Respondent's locations or facilities nationwide. The documents or list should be separated for each facility/location nationwide and include:

a. name

b. social security number

c. last known home address and telephone number

d. sex

e. medical condition

f. date of application

g. date of hire (or promotion), and job classification at hire (or promotion)

h. test date, test score (overall test score and any and all sub-test scores), name of test administered, test result (pass, fail, or other classification)

i. position held at the time test was administered (for individuals employed at the time or returning to work)

j. position sought at the time test was administered (for individuals returning to work or seeking promotion or hire)

k. reason why test was administered to each person tested

l. date and reason for termination (if applicable)

m. name and job title of any individual(s) responsible for the hiring, promotion, or termination decisions based on test results for each person who took any test or variation.

EEOC Response: Respondent has failed to provide <u>any</u> *data for Respondent's facilities and locations nationwide. Respondent has also failed to provide many categories of data (i.e., data "variables") regarding Respondent's Goodyear, Arizona facility in its response to this request. Respondent has not provided the test*

taker's name, social security number, last known home address and phone number, date of birth, date of application, date of hire or promotion, job classification at time of hire or promotion, test date, position held and sought at the time the test was administered, date and reason for termination, and name and job title of any individual(s) responsible for the hiring, promotions, or termination decisions. Although, Respondent has provided "job class," it is unclear whether "job class" refers to positions sought or positions held. Additionally, because social security numbers have not been provided, it is not clear that the employee ID provided can in fact be used to uniquely identify individuals within the data file provided or link the present data to data contained in files that may be provided in response to subsequent requests. Respondent has also failed to provide adequate responses defining other variable response categories (e.g., meaning of each test reason category identified in the variable "TestReasonName"). Provide a complete response that includes data for Respondent's facilities and locations nationwide, data for all the missing variables, as well as complete explanations of the definitions for each variable response category (e.g., for the variable "TestReasonName," and "Job Class"), and whether there is an overlap or redundancy among variable response categories. Finally, Respondent has failed to provide data regarding food services. Please provide data for food services for the variables identified above and include information that is responsive to the requests outlined here.

McLane Sunwest: McLane Sunwest previously produced the data for McLane Sunwest as Exhibit 39. Regarding the EEOC's request for additional information regarding the headings:

- **Employee ID—refers to a unique identifier for each individual.**
- **Gender—the employee's sex.**
- **TestDate—refers to the date the employee took the IPCS PCE.**
- **TestReasonName—refers to the reason the employee indicated he or she was taking the IPCS PCE.**
- **Job Class—refers to the position for which the individual is taking the PCE to determine whether he or she is capable of performing the essential functions.**
- **Job Target—refers to the physical capability level the employee needed to safely perform the essential functions of the particular position.**
- **Met Min Req—refers to whether the employee has the physical capability to perform the essential function of the particular position.**
- **Level Achieved—refers to the physical capability shown by the individual on the particular IPCS PCE.**

McLane Sunwest is producing the data for the grocery division as Exhibit 80 (provided in

the enclosed CD). It is not clear why the EEOC needs the individual's names, medical condition (particularly considering Ms. Rusden informed counsel that the EEOC is not pursuing Ms. Ochoa's disability claim), social security numbers, last known addresses, phone numbers or other personal identifiers to analyze the validity and/or impact of the IPCS PCE.

McLane Sunwest objects to this request for the reasons stated in, among other responses, its Petition to Revoke, dated February 22, 2011. Further, for the reasons stated above, McLane Sunwest objects to the request for data regarding Foodservices, Inc.

9. Provide documents which reflect or a list of all Respondent's facilities and locations in existence from January 1, 2006 to the present.

EEOC Response: Respondent has not provided information relating to food services. Provide the facilities and locations of McLane's food services division.

McLane Sunwest: McLane Sunwest has previously provided all information responsive to the grocery division. As stated above, McLane Sunwest objects to the request for data regarding Foodservices, Inc.

10. For all Respondent facilities/locations nationwide from January 1, 2006 to the present and with respect to any test or variation identified in #4 and #5 above, provide documents or a list of

information identifying all persons by name, last known home address and telephone number, and social security number, who were:

a. terminated because of an inability to pass any test or variation,

b. reassigned and/or transferred because of an inability to pass any test or variation,

c. not hired because of an inability to pass any test or variation,

d. not promoted because of an inability to pass any test or variation,

EEOC Response: Respondent has not provided any documentation in response to this request. Provide documents or a list of information identifying by name, last known home address and telephone number, and social security number all persons who did not pass the test and experienced termination, transfer, or were not hired or promoted.

McLane Sunwest: McLane Sunwest objects to this request for the reasons stated in, among other responses, its Petition to Revoke, dated February 22, 2011.

11. For each person identified in 10(a) through 10(d), provide documents which reflect:

a. date of termination, reassignment, transfer, not hired or not promoted,

b. name and title of the individual who made the decision to terminate, reassign,

transfer, not hire and/or not promote the person based on test results.

EEOC Response: Respondent has provided no responsive documents to this request. Provide the date when the employee or applicant was terminated, reassigned, transferred, or not hired or promoted, and the name and title of the person who made that decision based on test results.

McLane Sunwest: McLane Sunwest objects to this request for the reasons stated in, among other responses, its Petition to Revoke, dated February 22, 2011.

12. For each test or variation identified in #4 or #5, provide any and all documents evidencing any change, whether a reduction or increase, in workplace injuries.

EEOC Response: Respondent has not provided documents responsive to this request. Provide all responsive documents.

McLane Sunwest: McLane Sunwest is currently in the process of compiling and analyzing information relating to workplace injuries and the impact of the IPCS PCE. McLane Sunwest will supplement.

13. From January 1, 2006 to the present, if Respondent received any formal or informal complaints by any employee other than Charging Party concerning the test(s), or any claims of discrimination based on sex

and/or disability, submit documents evidencing the following:

a. name and job title of each person who complained,

b. name and job title of each person receiving each complaint,

c. date of each complaint,

d. any and all formal and informal written record reflecting the complaint and the name and position title of the person who is subject of the complaint,

e. record of all actions taken by your organization in response to each complaint, including copies of all remedial actions taken.

EEOC Response: Although Respondent has provided some information in response to this request, it has not provided information regarding whether there were any internal complaints other than EEOC Charges, the name and job title of each person who received the complaints, formal or informal written records regarding the complaints, and records of all actions taken in response to complaints.

McLane Sunwest: McLane Sunwest objects to this request for the reasons stated in, among other responses, its Petition to Revoke, dated February 22, 2011. To further clarify, McLane Sunwest does not track internal complaints regarding the IPCS test.

14. Provide documents or a list* of all individuals who applied for a position, for which the test identified in #4 and #5 above was in use, at any location or facility of Respondent during the relevant time period. Include:

a. name

b. social security number

c. last known home address and telephone number

d. sex

e. medical condition(s)

f. date of application

g. whether the applicant was hired, and date and reason for hire or non-hire

h. location at which they applied and

i. position for which they applied.

EEOC Response: The Commission has not received documents or a list responsive to this request. Provide responsive documents or a list identifying the individuals who applied for a position for which the IPCS test was in use as well as responses to subparts a through i.

McLane Sunwest: McLane Sunwest objects to this request for the reasons stated in, among other responses, its Petition to Revoke, dated February 22, 2011. To further clarify, McLane Sunwest does not keep a list of all individuals who apply for positions, detailed information about the individuals, their application, and/or

position sought. Please refer to the response to Request No. 8 for information regarding the individuals who took the IPCS test in the grocery division.

15. Provide documents or a list* of all individuals who sought promotion or were selected for promotion to a position, for which the test identified in #4 and #5 above was in use, at any and location or facility of Respondent from January 1, 2006 to the present. Include:

a. name

b. social security number

c. last known home address and telephone number

d. sex

e. medical condition(s)

f. date promotion sought

g. whether the individual seeking promotion was selected, and, if so, date and reason for selection or non-selection

h. location at which they sought promotion and

i. position for which they sought promotion,

EEOC Response: Respondent has not provided documents or a list responsive to this request. Provide

responsive documents or a list identifying the individuals who sought a promotion or were selected for a promotion for a position for which the IPCS test was in use; and provide responses to subparts a through i.

McLane Sunwest: McLane Sunwest objects to this request for the reasons stated in, among other responses, its Petition to Revoke, dated February 22, 2011. To further clarify, McLane Sunwest does not keep a list of all individuals who apply for positions, detailed information about the individuals, their application, and/or position sought. Please refer to the response to Request No. 8 for information regarding the individuals who took the IPCS test in the grocery division.

16. Provide documents or a list* of all individuals who were employed by Respondent at any location or facility nationwide from January 1, 2006 to the present. The documents or list should be separated for each facility/location nationwide and include:

a. name

b. social security number

c. last known home address and telephone number

d. sex

e. medical condition(s)

f. date of hire

g. all position titles held

h. dates when each position title was held

i. termination date and reason, If applicable.

EEOC Response: Respondent has provided no responsive documents to this request. Provide responsive documents or a list identifying the individuals who were employed by Respondent, and provide responses to subparts a through i.

McLane Sunwest: The Company remains perplexed by this request seeking personal information regarding every employee nationwide, regardless of position. The requested information is irrelevant to the EEOC's investigation and the EEOC was unwilling to discuss the relevance of this and other information when the parties met.

17. Provide complete copies of the personnel files, including but not limited to all documents relating to applications for employment, pay history and wages, job titles and job duties, work performance, evaluations, commendations, complaints made by him or her, complaints made about him or her, write-ups, warnings, counselings, disciplinary action, personnel action forms, communication logs, termination, and reasons for separation or termination for Bobby Carlson (President), Theresa Hatch (Human Resources Manager) and Janann Williams (Vice President, People).

EEOC Response: Respondent has not provided responsive documents to this request. Please provide responsive documents.

McLane Sunwest: McLane Sunwest objects to this request for the reasons stated in, among other responses, its Petition to Revoke, dated February 22, 2011.

18. List any and all alternatives to the ICPS [sic] **or IPCT test that Respondent considered implementing in lieu of the ICPS** [sic] **or IPCT test. Include:**

a. copies of all documents Respondent reviewed in considering any such alternatives.

b. copies of all documents relating to any findings, analyses, determinations made by Respondent regarding any such alternatives.

EEOC Response: Respondent has not provided responsive documents. If Respondent did not consider implementing alternatives to the IPCS test, please state in your response that no alternatives to the IPCS test were considered by Respondent in lieu of the IPCS test.

McLane Sunwest: Some of the grocery distribution centers were using other PCEs prior to the IPCS PCE; however, the Company does not have knowledge that these were considered when implementing IPCS. We will supplement this response as additional information is discovered.

Subpoena for Witness Testimony

EEOC Response: Respondent has failed to comply with the Commission's subpoena for witness testimony "from the key decision maker(s) in the process that led to Respondent's implementation of the Industrial Physical Capability Strength Test (IPCS) and Isokinetic Physical Capability Test (IPCT) tests or variation of the IPCS and the IPCT tests for the Food Services Division." This witness testimony is relevant given that the Food Services Division also uses the IPCS and/or IPCT tests or variations. Please identify the witness and time of availability by November 22, 2011.

McLane Sunwest: McLane Sunwest objects to this request for the reasons stated in, among other responses, its Petition to Revoke, dated February 22, 2011. Of significance, the testimony sought is outside the scope of Ms. Ochoa's Charge and does not seek evidence that is relevant or material to the investigation.

Additionally, to generally supplement McLane Sunwest's production to date, please refer to the documents regarding the IPCS PCE produced as Exhibit 81. A document to be included in Ms. Ochoa's personnel file (previously produced as Exhibit 55), is produced as Exhibit 82. Further, correspondence regarding the validation of the IPCS PCE is produced as Exhibit 83.

As mentioned above, we are actively working to compile additional information and further respond. We will supplement this response as further information becomes available. In the interim, if you have any questions, please let us know.

Sincerely,

Snell & Wilmer, L.L.P.

/s/ Ashley Kasarjian
Joshua Woodard
Ashley Kasarjian

[Doc. 9-2]

EXHIBIT 42

Snell & Wilmer
CCC L.L.P.CCC
LAW OFFICES

One Arizona Center
Phoenix, AZ 85004-2202
602.382.6000
602.382.6070 (Fax)
www.swlaw.com

Joshua R. Woodard
602-382-6281
jwoodard@swlaw.com

DENVER
LAS VEGAS
LOS ANGELES
LOS CABOS
ORANGE COUNTY
PHOENIX
SALT LAKE CITY
TUCSON

February 22, 2012

VIA FAX: (602) 640-5071
AND HAND DELIVERY

Rayford O. Irvin
Equal Employment Opportunity Commission
District Director (Issuing Official)
3300 North Central Ave., Ste. 690
Phoenix, Arizona 85012

Re: **Supplemental Response to Subpoena No. PHX-12-20**
Ochoa v. McLane Sunwest,
Charge No. 540-2008-01093
Hernandez v. McLane Sunwest,
Charge No. 540-2011-02916
Banda v. McLane Pacific,
Charge No. E2010011CO202-00-pe

Response to Subpoena No. PHX-12-22
Hernandez v. McLane Sunwest,
Charge No. 540-2011-02916

Dear Mr. Irvin:

As discussed more fully in the Petition to Revoke the above-referenced Subpoena No. PHX-12-20, Respondent McLane/Suneast, Inc. (d/b/a "McLane Sunwest" and "McLane Pacific")[1] has legitimate concerns with the Subpoena, as well as the identical Subpoena

[1] The EEOC issued the current Subpoena to "McLane Company." However, this is not a valid corporate entity. The underlying Charges of Discrimination on which this Subpoena relies were all filed against McLane/Suneast, Inc., doing business in Goodyear, AZ as "McLane Sunwest" and doing business in Merced, CA as "McLane Pacific." Accordingly, McLane Sunwest and McLane Pacific are responding to the Subpoena.

No. PHX-12-22, purportedly issued under the Age Discrimination in Employment Act. Notwithstanding those concerns, McLane Sunwest and McLane Pacific have consistently expressed a willingness to cooperate with the EEOC. Without waiving the general and specific objections previously submitted in the Petition for Revocation, which are hereby incorporated herein by reference, McLane Sunwest and McLane Pacific provide the following supplemental response to the Subpoenas.

I. FACTUAL BACKGROUND

A. McLane Sunwest

McLane Company, Inc. ("McLane") is a supply chain services company, providing grocery supply chain solutions for convenience stores, mass merchants, and drug stores throughout the United States. In addition to having several discrete operating locations, McLane also has a number of completely separate subsidiary companies.

McLane/Suneast, Inc., d/b/a "McLane Sunwest" and/or "McLane Pacific," is a subsidiary of McLane that operates grocery distribution centers. McLane Sunwest and Pacific have been, and remain, committed to developing dedicated, well-trained teams that are focused on excellence. As equal opportunity employers, McLane Sunwest and McLane Pacific prohibit unlawful discrimination in every aspect of the employment relationship. Further, McLane Sunwest and McLane Pacific are committed to protecting the safety

and health of all employees, and employing individuals in positions in which they are capable of safely performing the essential functions of their jobs.

B. Use of the IPCS PCE for Placing Individuals in Positions They Are Capable of Safely Performing

McLane and its subsidiaries take the safety of their employees seriously. Specifically, with regard to McLane Sunwest and McLane Pacific, in order to ensure that employees are capable of safely performing the physically demanding jobs, all newly hired individuals, employees returning from an absence of thirty days or more, as well as employees seeking a job that is more physically demanding than their current job, are required to take a physical capability exam known as the Industrial Physical Capability Strength Test (referred to as "PCE" or "IPCS PCE"). If an employee cannot meet the minimum strength requirement in order to safely perform the essential functions for the particular position, the employee may be given an opportunity to retest. During this time, the employee is encouraged to work to enhance their overall physical capability.

Industrial Physical Capability Services, Inc. ("IPCS") oversees the testing in order to ensure objectivity, validity, and reliability. Over the past thirty years, IPCS has provided its standardized capability assessments to numerous industrial clients in the

trucking, distribution, airline, manufacturing and utility industries. Numerous comparative studies have evaluated the effectiveness of IPCS testing on the reduction in the frequency and severity of injuries. For example, in a 16-month analysis of new employees who were evaluated by IPCS testing, there was a 70.5% reduction in the incident rate of injury. In another study, 14 food distribution locations took part in a 35-month study that concluded that there was a dramatic impact on the reduction of the frequency and severity of injuries. McLane Sunwest previously provided the studies to the EEOC.

In order to match the physical capabilities of the worker to the physical demands of a particular job, a Job Task and Physical Activities Analysis is performed by an independent company that observes and analyzes the performance of the job duties. This analysis determines the target physical capability score required for each particular job. McLane Sunwest and McLane Pacific employees go to an approved clinic, with trained IPCS providers, to take the PCE. The PCE is performed on an isokinetic machine that focuses on the major muscle groups of the shoulders and legs, as strength in these two areas is necessary when performing the essential functions of these physically demanding jobs. The machine allows a dynamic evaluation of specific movement patterns and accommodates an individual's weaknesses and strengths by providing resistance equal to the force applied against the machine. Physical capability evaluations are critical at

McLane Sunwest and McLane Pacific given the physically demanding nature of certain jobs.

C. McLane Sunwest's and McLane Pacific's Cooperation with the EEOC

McLane Sunwest and McLane Pacific have made significant efforts to cooperate with the EEOC's ever expanding investigation. McLane Sunwest and McLane Pacific have produced volumes of documents and information to assist the EEOC with its investigation, including providing the EEOC with an excel file relating to all individuals who have taken the IPCS PCE in relation to all Grocery entities, as well as their gender, test date, test reason, job class, job target, whether the individual met the minimum requirements of the position, and the level he or she achieved.[2] Among numerous other things, McLane Sunwest and McLane Pacific also provided policies and procedures related to the IPCS PCE, documents related to charging parties' taking of the PCE and their IPCS PCE results, the job task analysis for all positions within all Grocery operations, the documentation employees receive regarding the IPCS PCE, physical demands and strength definitions, validation studies and injury analyses, opinion letters regarding the validity of the IPCS PCE, and various other documents and information explaining the IPCS PCE.

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[2] Similar data that also included the age of the individual at the time of the IPCS PCE was produced by McLane in response to the EEOC's ADEA investigation.

McLane Sunwest and McLane Pacific have consistently emphasized to the EEOC that if it has concerns with the IPCS PCE, or suggestions as to the use of the IPCS PCE, the company genuinely wants to hear them. McLane Sunwest's and McLane Pacific's primary goal has always been to safely employ people who are qualified to perform the essential functions of these physically demanding positions. Unfortunately, the only information McLane or McLane Sunwest or McLane Pacific have ever been given in their efforts to engage the EEOC in discussions was Investigator Rusden's comment to counsel for McLane that the EEOC was "looking for victims."

McLane Sunwest and McLane Pacific remain committed to cooperating with the EEOC as to the validity of the IPCS PCE. McLane Sunwest and McLane Pacific believe they are utilizing a validated PCE that adds significant value to the goal of placing teammates in positions they can safely perform. However, McLane Sunwest and McLane Pacific must object to the EEOC's fishing expedition to find "victims," without regard to the validity of the IPCS PCE.

II. SPECIFIC OBJECTIONS TO THE EEOC'S REQUESTS

REQUEST NO. 1: Provide documents describing the process by which the measurements obtained in the Industrial Physical Capability Services, Inc. (IPCS) physical capability evaluation (PCE) (e.g., peak

torque, body symmetry ratio scores, force curve analysis, body weight, etc.) are combined to arrive at the final IPCS physical capability index score.

a. Provide the "validated mathematical model, which generates the IPCS physical capability index score" referenced in the document "The IPCS Score—What Is It?" or the document "The IPCS Proprietary Formula—What Is It?" Provide a detailed explanation of how the "final absolute score" referenced in this document is calculated, and how this score used to arrive at the IPCS physical capability index score. If the "final absolute score" for a given individual and that individual's IPCS physical capability index score are one and the same, indicate this.

b. Include any available documentation (e.g. technical documentation developed by IPCS or McLane Sunwest, etc) that details the development, validation, and/or utilization of the "validated mathematical model."

RESPONSE TO REQUEST NO. 1: Based on literature from IPCS, McLane Sunwest and McLane Pacific believe that the IPCS PCE was developed by Dr. Thomas B. Gilliam based on many years of research and experience and it has been validated several times since its development. McLane Sunwest and McLane Pacific have provided substantial documents and information relating to the IPCS PCE. As explained previously and in documents provided: To calculate the IPCS score from the isokinetic evaluation, the following measurements are necessary:

☐ Peak Torque—how many foot pounds of torque are generated during each major movement pattern (i.e. knee flexion/extension and shoulder flexion/extension).

☐ Body Symmetry ratio scores—the relationship of various body segments is critical to the worker performing the essential functions of the job safely. Specifically, the relationship of the shoulder flexors to the shoulder extensors, knee flexors to the knee extensors, right to left comparisons for the flexors and extensors for the shoulder and knee. In addition, the upper strength relative to the lower body strength is determined.

☐ Force curve analysis—each major set of force curves is objectively evaluated for normalcy. The score ranges from 0.0 to 1.0 where 0.0 is a flat line curve (no force generated) to a perfect shaped curve, which is a 1.0. The force curve is not determined by age or gender. Perfect force curves can be generated by young and old or male and female.

☐ Body weight—body weight is divided into the final absolute score. Body weight is used to make sure the force generated is adequate to not only support an individual's body weight but also to safely perform the essential functions of the job. This means that a person who weighs 250 pounds needs to generate more torque that a person who weighs 150 pounds.

The body weight factor also has the effect of neutralizing differences between genders since (generally) most females weigh less than males.

These measurements are then applied to a "validated mathematical model," which generates the IPCS physical capability index score. It is McLane Sunwest's and McLane Pacific's understanding that Dr. Gilliam developed the mathematical formula over time and based on his vast experience in the industry. McLane Sunwest and McLane Pacific were informed that Dr. Gilliam had worked in the industry of performing isokinetic physical capability evaluations since 1982, and prior to that was a tenured faculty member at the University of Michigan where he was responsible for the isokinetic testing of the University's athletes. Dr. Gilliam provided McLane Sunwest and McLane Pacific with several validation studies done over the years and explained the variables in the mathematical formula as discussed above.

The exact mathematical formula itself, however, is considered highly confidential and proprietary to IPCS. McLane Sunwest and McLane Pacific do not know and cannot provide the mathematical formula. As such, McLane Sunwest and McLane Pacific have to object to this Request as seeking information not within their care, custody, or control. McLane Sunwest and McLane Pacific further object to this Request as seeking confidential, proprietary, and trade secret information belonging to IPCS.

REQUEST NO. 2: Job Task Analysis documentation provided to date indicates that video associated with the job task analyses is available.

a. Provide copies of any and all videos and/or any other recordings used for the purpose of analyzing the tasks performed for all positions for which a Job Task Analysis was completed.

b. Provide copies of any and all videos and/or any other recordings created in the course of the Job Task Analysis process.

RESPONSE TO REQUEST NO. 2: McLane Sunwest and McLane Pacific obtained the requested videos from GMSI and are producing copies relating to all Grocery operations herewith. *See* enclosed CD designated as Exhibit 84.

REQUEST NO. 3: Provide copies of any and all revisions of Job Task Analyses developed to date, including but not limited to those completed in 2011.

RESPONSE TO REQUEST NO. 3: McLane Sunwest has produced copies of JTAs relating to all Grocery operations. McLane Sunwest and McLane Pacific have also undertaken significant investigation to determine the accuracy and completeness of their production. As this investigation continues, McLane will produce any additional JTAs it discovers in relation to Grocery positions. Enclosed herewith are additional JTAs. *See* Exhibit 85.

REQUEST NO. 4: Provide the database compiled for McLane Sunwest by IPCS referenced in the document *New Hire Physical Capability Evaluation Proposal Presented to McLane Company, Inc.* Include a

description of all tables and data fields/variables included in the database.

RESPONSE TO REQUEST NO. 4: McLane Sunwest previously provided the EEOC with relevant information from this database relating to all Grocery operations. McLane Sunwest provided a CD with an excel spreadsheet that included identification numbers for each person taking the IPCS PCE, gender, location where they worked or sought to work, reason for taking the test, position sought, physical capability level achieved, and whether the physical capability achieved met the minimum requirement for the particular position, among other things.[3] At the EEOC's request, McLane Sunwest supplemented its responses to define the fields in the spreadsheet.

McLane Sunwest and McLane Pacific object to producing information already provided to the EEOC. McLane Sunwest and McLane Pacific also object to this request as irrelevant, overly broad, and seeking to harass the Company. McLane Sunwest and McLane Pacific further object to this request as seeking confidential information, including names and social security numbers.

REQUEST NO. 5: Provide copies of all status reports generated from the database referenced in the

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[3] McLane provided the EEOC with similar information but also including the individual's age as of the date of the test. As the EEOC knows, this information is already the subject of an EEOC-initiated enforcement action.

document New Hire Physical Capability Evaluation Proposal Presented to McLane Company, Inc.

RESPONSE TO REQUEST NO. 5: Neither McLane Sunwest nor McLane Pacific requested status reports from IPCS. In their efforts to cooperate with the EEOC, McLane Sunwest and McLane Pacific investigated whether other related entities within Grocery operations requested and received such status reports, Previously unknown to McLane Sunwest and McLane Pacific, three facilities within these related entities received such status reports on their own initiative. McLane Sunwest and McLane Pacific object to producing confidential information such as names and social security numbers. Subject to the confidentiality objection, McLane Sunwest and McLane Pacific are producing the status reports they have been able to locate through reasonable investigation. *See* Exhibit 86.

REQUEST NO. 6: Provide copies of any documentation prepared for McLane Sunwest by IPCS concerning the effectiveness of the IPCS PCE.

RESPONSE TO REQUEST NO. 6: McLane Sunwest and McLane Pacific have produced a substantial amount of information and documents responsive to this request. McLane Sunwest and McLane Pacific are currently unaware of any additional documentation that would be responsive, McLane Sunwest and McLane Pacific are, however, committed to continuing their investigation in this regard and will produce any additional responsive documentation discovered, subject to any confidentiality issues currently unknown.

III. CONCLUSION

As illustrated by McLane Sunwest's and McLane Pacific's previous responses to the EEOC's requests for information and responses herein, McLane Sunwest and McLane Pacific are committed to working with the EEOC to provide relevant information to facilitate the EEOC's investigation, particularly its consideration of the validity of the IPCS PCE.

Sincerely,

Snell & Wilmer

/s/ Joshua R. Woodard
Joshua R. Woodard

JW:mb

cc: Barbara Rusden
EEOC, Investigator
3300 North Central Ave., Ste, 690
Phoenix, Arizona 85012
Barbara.Rusden@EEOC.gov

[Doc. 9-2]

EXHIBIT 43

Snell & Wilmer
CCC L.L.P.CCC
LAW OFFICES

One Arizona Center
400 East Van Buren Street
Suite 1900
Phoenix, Arizona 85004-2202
602.382.6000
602.382.6070 (Fax)
www.swlaw.com

Joshua R. Woodard
602-382-6281
jwoodard@swlaw.com

DENVER
LAS VEGAS
LOS ANGELES
LOS CABOS
ORANGE COUNTY
PHOENIX
SALT LAKE CITY
TUCSON

March 2, 2012

VIA HAND-DELIVERY

Barbara Rusden
Equal Employment Opportunity Commission
District Director (Issuing Official)
3300 North Central Ave., Ste. 690
Phoenix, Arizona 85012

Re: Charge No. 540-2008-01093

Dear Ms. Rusden:

Respondent hereby supplements its February 22, 2012 response to Request No. 2 seeking videos associated with the job task analyses. Enclosed are four additional videos relating to GMSI's Job Task Analyses.

Please let us know if you have any questions.

Very truly yours,

Snell & Wilmer

/s/ Joshua R. Woodard
Joshua R. Woodard

JHW/eiw:cg
Enclosures

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* * *

[Doc. 9-2]

EXHIBIT 47

Snell & Wilmer
CCC L.L.P.CCC
LAW OFFICES

One Arizona Center
400 East Van Buren Street
Suite 1900
Phoenix, Arizona 85004-2202
602.382.6000
602.382.6070 (Fax)
www.swlaw.com

Joshua R. Woodard
602-382-6281
jwoodard@swlaw.com

DENVER
LAS VEGAS
LOS ANGELES
LOS CABOS
ORANGE COUNTY
PHOENIX
SALT LAKE CITY
TUCSON

April 10, 2012

VIA FAX: (602) 640-5071
AND HAND DELIVERY

Rayford O. Irvin
Equal Employment Opportunity Commission
District Director (Issuing Official)
3300 North Central Ave., Ste. 690
Phoenix, Arizona 85012

Re: **Petition to Revoke Subpoena**
No. PHX-11-32
Damiana Ochoa v. McLane Sunwest
Charge No.: 548-2008-01093

Dear Mr. Irvin:

Respondent McLane/Suneast, Inc. (d/b/a/ "McLane Sunwest") hereby responds to the Final Determination dated March 21, 2012 ("Determination"), entered in response to McLane Sunwest's Petition to Revoke the EEOC Subpoena No. PHX-11-32 (the "Subpoena")—a petition submitted over a year prior. McLane Sunwest submits this response subject to and without waiving the responses and objections previously submitted.

In its Determination, the EEOC references only Requests 8(a)-(l), 10, 11(a), 14 and 15 and this response addresses only those Requests. By implication, the EEOC has granted Respondent's Petition to Revoke with respect to the remaining Requests, including Requests 1, 2, 3, 4, 5, 6, 7, 8(m), 9, 11(b), 12, 13, 16, 17, and 18.

I. GENERAL OBJECTIONS

McLane Sunwest objects to the Subpoena, as described more fully in previous correspondence and in its Petition to Revoke which are incorporated herein by this reference, and further objects to the Determination, as such Subpoena and Determination seek irrelevant information and exceed the EEOC's investigative authority and constitute an abuse of process.

The Subpoena and Determination are objectionable for several reasons including, but not limited to, the fact that they: (1) require Respondent to produce or create information, electronic or otherwise, in a medium or format other than that in which such information is maintained in the normal course of business and, therefore, are unduly burdensome; (2) require production and indexing of extensive electronically-stored information, the collection and production of which would seriously disrupt Respondent's normal business operations and cause significant monetary expense to Respondent that would outweigh the probative value of such information and, therefore, are unduly burdensome; (3) seek information and/or documents that are not relevant to the Charge being investigated by the EEOC or any aspect of Charging Party's employment with McLane Sunwest and/or the validity of the IPCS physical capability exam ("PCE") and, therefore, are not reasonably calculated to lead to the discovery of admissible evidence in any proceeding related to the allegations in the Charge; (4) seek information concerning employment policies, practices, or decisions other than those at issue in the Charge and, therefore,

are not reasonably calculated to lead to the discovery of admissible evidence; (5) are not properly limited in time and seek documents beyond any statute of limitations applicable to the Charge and, therefore, are not reasonably calculated to lead to the discovery of admissible evidence; (6) require Respondent to provide information and/or documents about employees nationwide at independent facilities owned and/or operated by McLane Company, Inc. ("McLane"); (7) require documents to be provided that are not within the possession, custody or control of Respondent; and (8) require the Respondent to provide information and/or documents, including proprietary and confidential information, concerning McLane Sunwest and/or other the [sic] divisions of McLane and their employees, policies, practices, or decisions other than those at issue in the Charge.

Respondent further objects to the extent the Subpoena and Determination seek pedigree information similar to the pedigree information the EEOC sought in its ADEA investigation regarding McLane and that the United States District Court in *EEOC v. McLane Company, Inc.* (United States District Court, District of Arizona, Case No. 2:12-mc-00007-GMS) ("EEOC v. McLane Matter") found to be not "'relevant' to an investigation of [the] use of the test to make employment decisions." *See* Court's Order, page 8, lines 14-15. Respondent further objects to the extent the EEOC has requested pedigree information in the Subpoena and Determination "as a means of trolling for possible complainants. . . ." *Id.* at page 9, lines 4-5.

II. SPECIFIC RESPONSES AND OBJECTIONS TO THE EEOC'S REQUESTS

Request 8. **For January I, 2006 to the present date, provide documents or a listing of information identifying all persons who took any test or variation identified in #4 and #5 in connection with employment at any of Respondent's locations or facilities nationwide. The documents or list should be separated for each facility/location nationwide and include:**

a. **name**

b. **social security number**

c. **last known home address and telephone number**

d. **date of birth**

e. **medical condition**

f. **date of application**

g. **date of hire (or promotion), and job classification at hire (or promotion)**

h. **test date, test score (overall test score and any and all sub-test scores), name of test administered, test result (pass, fail, or other classification)**

i. **position held at the time test was administered (for individuals employed at the time or returning to work)**

j. position sought at the time test was administered (for individuals returning to work or seeking promotion or hire)

k. reason why test was administered to each person tested

l. date and reason for termination (if applicable)

m. name and job title of any individual(s) responsible for the hiring, promotion, or termination decisions based on test results for each person who took any test or variation.

Response: McLane Sunwest already has produced information relating to the IPCS testing at its facility, as well as information relating to the IPCS testing at McLane's Grocery operations. Respondent objects to the remaining portions of this virtually unlimited Request for any and all testing, even testing related to separate corporate entities, as a fishing expedition constituting an abuse of process by the EEOC. This nationwide data sought by the EEOC is unnecessary for analyzing and validating the IPCS PCE and, therefore, this Request seeks information that is not relevant. Without waiving the objections herein and those objections previously lodged, Respondent will supplement its prior submissions with additional information consistent with what the Court determined to be relevant in the EEOC v. McLane Matter. Enclosed herewith, McLane Sunwest is providing a CD identified as Exhibit 87, which includes a database of all individuals who have taken the IPCS PCE in relation to Grocery

positions nationwide through the date of the data collection. McLane Sunwest stands on its objections to the extent the Request seeks the production of personal identifiers. However, the database includes most of the other information sought in this Request, to the extent such information is available.

Request 10. **For all Respondent facilities/ locations nationwide from January 1, 2006 to the present and with respect to any test or variation identified in #4 and #5 above, provide documents or a list of information identifying all persons by name, last known home address and telephone number, and social security number, who were:**

a. **terminated because of an inability to pass any test or variation,**

b. **reassigned and/or transferred because of an inability to pass any test or variation,**

c. **not hired because of an inability to pass any test or variation,**

d. **not promoted because of an inability to pass any test or variation.**

Response: Respondent objects to this request as irrelevant, overly broad, unduly burdensome and seeking solely to harass Respondent. Respondent further objects to this Request to the extent it seeks confidential information. Respondent objects to the remaining portions of this virtually unlimited Request for any and all testing, even testing related to separate corporate entities, as a fishing expedition constituting an abuse

of process by the EEOC. This nationwide data sought by the EEOC is unnecessary for analyzing and validating the IPCS PCE and, therefore, this Request seeks information that is not relevant. Without waiving the objections herein and those objections previously lodged, Respondent will supplement its prior submissions with additional information consistent with what the Court determined to be relevant in the EEOC v. McLane Matter. Enclosed herewith, McLane Sunwest is providing a CD identified as Exhibit 87, which includes a database of all individuals who have taken the IPCS PCE in relation to Grocery positions nationwide through the date of the data collection. McLane Sunwest is also in the process of analyzing PeopleSoft data to determine whether any adverse action occurred following the IPCS PCE consistent with the parameters of the Court's Order in the EEOC v. McLane Matter. This response will be supplemented once the analysis is complete.

Request 11(a). **For each person identified in 11(a) through 11(d) [sic], provide documents which reflect: date of termination, reassignment, transfer, not hired or not promoted.**

Response: Respondent objects to this request as irrelevant, overly broad, unduly burdensome and seeking solely to harass Respondent. Respondent further objects to this Request to the extent it seeks confidential information. Respondent objects to the remaining portions of this virtually unlimited Request for any and all testing, even testing related to separate corporate entities, as a fishing expedition constituting an abuse

of process by the EEOC. This nationwide data sought by the EEOC is unnecessary for analyzing and validating the IPCS PCE and, therefore, this Request seeks information that is not relevant. Without waiving the objections herein and those objections previously lodged, Respondent will supplement its prior submissions with additional information consistent with what the Court determined to be relevant in the EEOC v. McLane Matter. Enclosed herewith, McLane Sunwest is providing a CD identified as Exhibit 87, which includes a database of all individuals who have taken the IPCS PCE in relation to Grocery positions nationwide through the date of the data collection. McLane Sunwest is also in the process of analyzing PeopleSoft data to determine whether any adverse action occurred following the IPCS PCE consistent with the parameters of the Court's Order in the EEOC v. McLane Matter. This response will be supplemented once the analysis is complete.

Request 14. **Provide documents or a list* of all individuals who applied for a position, for which the test identified in #4 and #5 above was in use, at any location or facility of Respondent during the relevant time period. Include:**

a. **name**

b. **social security number**

c. **last known home address and telephone number**

d. **sex**

e. medical condition

f. date of application

g. whether the applicant was hired, and date and reason for hire or non-hire

h. location at which they applied and

i. position for which they applied.

Response: Respondent objects to this request as irrelevant, overly broad, unduly burdensome and seeking solely to harass Respondent. Respondent further objects to this Request to the extent it seeks confidential information, Respondent objects to the remaining portions of this virtually unlimited Request for any and all testing, even testing related to separate corporate entities, as a fishing expedition constituting an abuse of process by the EEOC. This nationwide data sought by the EEOC is unnecessary for analyzing and validating the IPCS PCE and, therefore, this Request seeks information that is not relevant. Without waiving the objections herein and those objections previously lodged, Respondent will supplement its prior submissions with additional information consistent with what the Court determined to be relevant in the EEOC v. McLane Matter. Enclosed herewith, McLane Sunwest is providing a CD identified as Exhibit 87, which includes a database of all individuals who have taken the IPCS PCE in relation to Grocery positions nationwide through the date of the data collection. McLane Sunwest is also in the process of analyzing PeopleSoft data to determine whether any adverse action occurred following the IPCS PCE consistent with the parameters

of the Court's Order in the EEOC v. McLane Matter. This response will be supplemented once the analysis is complete.

Request 15. **Provide documents or a list* of all individuals who sought promotion or were selected for promotion to a position, for which the test identified in #4 and #5 above was in use, at any and location or facility of Respondent from January 1, 2006 to the present. Include:**

a. **name**

b. **social security number**

c. **last known home address and telephone number**

d. **sex**

e. **medical condition**

f. **date promotion sought**

g. **whether the individual seeking promotion was selected, and, if so, date and reason for selection or nonselection**

h. **location at which they sought promotion and**

i. **position for which they sought promotion,**

Response: Respondent objects to this request as irrelevant, overly broad, unduly burdensome and seeking solely to harass Respondent. Respondent further objects to this Request to the extent it seeks confidential

information. Respondent objects to the remaining portions of this virtually unlimited Request for any and all testing, even testing related to separate corporate entities, as a fishing expedition constituting an abuse of process by the EEOC. This nationwide data sought by the EEOC is unnecessary for analyzing and validating the IPCS PCE and, therefore, this Request seeks information that is not relevant. Without waiving the objections herein and those objections previously lodged, Respondent will supplement its prior submissions with additional information consistent with what the Court determined to be relevant in the EEOC v. McLane Matter. Enclosed herewith, McLane Sunwest is providing a CD identified as Exhibit 87, which includes a database of all individuals who have taken the IPCS PCE in relation to Grocery positions nationwide through the date of the data collection. McLane Sunwest is also in the process of analyzing PeopleSoft data to determine whether any adverse action occurred following the IPCS PCE consistent with the parameters of the Court's Order in the EEOC v. McLane Matter, This response will be supplemented once the analysis is complete.

IV. CONCLUSION

As indicated on multiple occasions, Respondent is and has been willing to provide information to allow the EEOC to analyze the validity of the IPCS PCE. In addition to the information discussed above, McLane Sunwest obtained and is also producing notes from GMSI in relation to the job task analysis conducted for

positions within Grocery operations. See Exhibit 88. Finally, once the EEOC analyzes the information produced, McLane Sunwest is more than willing to confer as to other specific information the EEOC deems necessary to its investigation as to the IPCS PCE. As it has indicated on many occasions, McLane Sunwest's goal is to utilize a valid method for protecting the safety of its teammates.

Sincerely,

SNELL & WILMER

/s/ Joshua R. Woodard
Joshua R. Woodard

cc: Barbara Rusden (w/o enclosures)
EEOC, Investigator
3300 North Central Ave., Ste. 690
Phoenix, Arizona 85012
Barbara.Rusden@EEOC.gov

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* * *

[Doc. 9-2]

EXHIBIT 49

Snell & Wilmer
CCC L.L.P.CCC
LAW OFFICES

One Arizona Center
400 East Van Buren Street
Suite 1900
Phoenix, Arizona 85004-2202
602.382.6000
602.382.6070 (Fax)
www.swlaw.com

Joshua R. Woodard
602-382-6281
jwoodard@swlaw.com

DENVER
LAS VEGAS
LOS ANGELES
LOS CABOS
ORANGE COUNTY
PHOENIX
SALT LAKE CITY
TUCSON

September 5, 2012

Rayford O. Irvin
District Director
Phoenix District Office
Equal Employment Opportunity Commission
3300 N. Central Avenue, Suite 690
Phoenix, AZ 85012-2504

Re: Ochoa v. McLane Company
Charge No.: 548-2008-01093

Dear Mr. Irvin:

This letter is in follow up to your requests for information from McLane Company, Inc, ("McLane"). As you know, much of the data that the EEOC requested McLane to produce had to be collected from third-party sources. When McLane originally collected the data

from Industrial Physical Capability Services, Inc. ("IPCS"), certain duplicate entries had been eliminated to make the data more user-friendly for conducting disparate impact analysis. For example, duplicate entries for the same person taking the IPCS PCE multiple times for the same reason artificially inflated the "does not meet requirement" rates,

In our efforts to comply with the Court's order of providing the EEOC information as to whether any adverse action occurred within 90 days of the IPCS PCE event, we discovered inconsistencies in the de-duplication process. As such, McLane requested new data from IPCS with no de-duplication, Additionally, McLane conducted significant quality checking to ensure that IPCS's data matched with McLane's PeopleSoft data. After extensive analysis, we have corrected any IPCS data that was determined to be inaccurate when compared to PeopleSoft and/or manually confirmed.

Importantly, the inconsistencies in IPCS's process for de-duplication and the corrections needed after comparison with PeopleSoft data would have occurred irrespective of whether those taking the IPCS PCE were identified using social security numbers or otherwise. The EEOC's repeated assertions to the contrary are simply inaccurate. Also, in the briefing to the Court, the EEOC states that it is unable to determine duplicate IPCS events by the same individual. The EEOC need only search an employee's or applicant's identifying number (for example, Charging Party

Damiana Ochoa, MCLANE011261) and all related IPCS PCE results can be found.

Enclosed herewith as Exhibit 89 is a CD containing the updated data from IPCS with no de-duplication and after the quality checking described above.

If you have any questions, please let us know.

Very truly yours,

SNELL & WILMER, L.L.P.

/s/ Joshua R. Woodard
Joshua R. Woodard
Ashley T. Kasarjian

cc: Barbara Rusden
EEOC, Investigator
3300 North Central Ave., Ste. 690
Phoenix, Arizona 85012

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* * *

[Doc. 9-2]

EXHIBIT 50

INDUSTRIAL PHYSICAL
CAPABILITY SERVICES, INC.

AUTHORIZATION & CONSENT FORM

Industrial Physical Capability Services, Inc. (I.P.C.S.) performs physical capability assessments utilizing isokinetic equipment. Isokinetic equipment can be used

to safely determine the physical capability of an individual and relate it to the physical demands of a job. This process allows the company to match your physical capability to the physical demands of the job.

An isokinetic evaluation is different from other assessment methods. You will not be asked to lift any weights. Unlike lifting a weight or a dumbbell, isokinetic equipment measures the amount of force generated by your muscles at different speeds of movement. The machine will not resist you until you achieve the pre-selected speed. You must push and pull as hard and fast as you can throughout the entire motion on every repetition. If you feel pain at any point during the evaluation, you may reduce your effort and the machine will automatically reduce its resistance.

You will be asked to perform certain movements using shoulder, knee, and/or trunk muscles. Other muscle groups may also be evaluated.

TO ACHIEVE ACCURATE RESULTS, *it is very important that you understand the following points*:

- **This evaluation assesses the maximum physical capability of your major muscle groups.**
- **You are expected to give your best effort on each repetition.**
- **You must perform MOVEMENTS REQUIRING MAXIMUM EFFORT for short time periods.**

- **You must PUSH and PULL the machine AS FAST and AS HARD as you can, within the limits of your physical capability.**

NOTE: You may experience some minor muscle discomfort *from the effort of exercise* during and following the evaluation. This is normal. However, if you experience an intolerable level of discomfort, reduce the pressure you are exerting so that the discomfort subsides, or discontinue the effort entirely.

_____

Client initials

I understand that I am to notify the technician administering the assessment of any prior/current injuries that I have experienced, particularly to the shoulder, knee, or trunk muscles. (Include strains, sprains, breaks, surgery, or other related abnormalities.)

I also understand that I should notify the technician administering the assessment if I am experiencing intolerable levels of discomfort while performing the assessment.

I understand that I should notify the technician administering the assessment if I am taking any prescribed or over-the-counter medication.

I understand that I should notify the technician administering the assessment if I have diabetes, high blood pressure or other health-related concerns.

I understand that if I am a female and pregnant that I should notify the technician administering the assessment.

I have read and understand the above information and I understand that I will be asked to give maximum, all-out effort ***within the limits of my ability****, and that I will be performing short periods of strenuous exercise. I understand that I am not expected to work through discomfort that I can not tolerate.* *

_____ _____

Signature of Client **Date**

**To the best of my knowledge, I feel that I can complete all parts of the physical capability evaluation, so I do hereby authorize _____ to perform the tests described and consent to participate in the evaluations.*

_____ _____

Signature of Client **Date**

The undersigned affirms that I have read, asked about, and received satisfactory explanation of any part of this document that I did not understand.

_____ _____

Signature of Client **Date**

I have witnessed the client reading and signing the information above, and I have answered the questions he or she has asked me.

_____ _____

Signature of Technician **Date**

* * *

[Doc. 9-2]

EXHIBIT 52

IPCS GUIDELINES FOR PHYSICAL CAPABILITY ASSESSMENT

Dear Candidate:

You have been scheduled for a **physical capability assessment** at the listed location. Your appointment is **on** _____, **at** ___ **AM/PM**. The assessment session will typically last under 45 minutes. **Please** carefully **read** the following **instructions**. If needed, you may contact the listed provider. We **ask 24 hours notice** should you need to **cancel** or **reschedule** your appointment.

Clinic Name: Telephone:

Address: Contact:

Job Applying for: _____

GUIDELINES:

1. **MUST** eat or drink a carbohydrate based **light meal** or beverage **within 2 hours** of the assessment session. Fruit, candy, or juice is acceptable.
2. **DO NOT** smoke 2-4 hours prior to your appointment.
3. **Refrain** from excessive caffeine or recreational alcohol use prior to the session. Added **water intake** is preferred.
4. Dress in sweat clothes/ casual exercise attire. **Tight fitting** street clothes **can limit** your true performance and cause discomfort.
5. As possible, **avoid intense exercise or lack of rest** 24 hours prior to the assessment session.
6. **Be aware** that an acute and/or aggravated injury, symptoms of severe illness, or pregnancy may require that the assessment be postponed.

WHAT IT IS.....SAFE!!!!

Your knee and shoulder muscles will be tested on state-of-the-art isokinetic equipment, identical to the type used for performance assessment of **pro-athletes!!!** The force producing capabilities of your muscles will be measured, not absolute strength. As you initiate movement on the speed controlled lever arm, the equipment resists your effort; therefore, this assessment is **not like** lifting weights. While performing the exercise movements, you will be stabilized and under the direct supervision of a trained clinician. Each assessment exercise lasts only 15-20 seconds per

set. **You will be required to give maximum** effort during each set for accurate measurement of your true physical capability. For **ultimate safety** the equipment will accommodate to your fatigue by **immediately** reducing the resistance as your effort declines thus **limiting** the possibility of overexertion. As with any exercise normal muscle soreness may occur within 48 hours. If you experience prolonged soreness and/or pain, contact your physician. Further instruction will be given the day of your assessment.

Dear Client:

You have been scheduled for a **physical capability assessment** at the listed location.

Your appointment is **on** _____, **at** ___ **AM/PM**. The assessment session will typically last under 45 minutes. **Please** carefully **read** the following **instructions**. If needed, you may contact the listed provider. We ask **24 hours notice** should you need to **cancel** or **reschedule** your appointment.

Clinic Name: Valley Rehab **Telephone:** (623) 932-9008

Address: 1072 S. Litchfield Rd. Goodyear, AZ. 85338

Job Applying for: _____

GUIDELINES:

1. **MUST** eat or drink a carbohydrate based **light meal** or beverage **within 2 hours** of the assessment session. Fruit, candy, or juice is acceptable.
2. **DO NOT** smoke 2-4 hours prior to your appointment.

3. **Refrain** from excessive caffeine or recreational alcohol use prior to the session. Added **water intake** is preferred.

4. Dress in sweat clothes/casual exercise attire. **Tight fitting** street clothes **can limit** your true performance and cause discomfort.

5. As possible, **avoid intense exercise or lack of rest** 24 hours prior to the assessment session.

6. **Be aware** that an acute and/or aggravated injury, symptoms of severe illness, or pregnancy may require that the assessment be postponed.

WHAT IT IS.....SAFE!!!!

Your knee and shoulder muscles will be tested on state-of-the-art isokinetic equipment, identical to the type used for performance assessment of **pro-athletes!!!** The force producing capabilities of your muscles will be measured, not absolute strength. As you initiate movement on the speed controlled lever arm, the equipment resists your effort; therefore, this assessment is **not like** lifting weights. While performing the exercise movements, you will be stabilized and under the direct supervision of a trained clinician. Each assessment exercise lasts only 15-20 seconds per set. **You will be required to give maximum** effort during each set for accurate measurement of your true physical capability. For **ultimate safety** the equipment will accommodate to your fatigue by **immediately** reducing the resistance as your effort declines thus **limiting** the possibility of overexertion. As with any exercise normal muscle soreness may occur within

48 hours. If you experience prolonged soreness and/or pain, contact your physician. Further instruction will be given the day of your assessment.

8/2/2007

GUIDELINES FOR PHYSICAL CAPABILITY ASSESSMENT

Dear Client

You have been scheduled for a **physical capability assessment** at the listed location.

Your appointment is **on** _____, **at** ____ **AM/PM.** The assessment session will typically last under 45 minutes. **Please** carefully **read** the following **instructions**: If needed, you may contact the listed provider. We ask **24 hours notice** should you need to **cancel** or **reschedule** your appointment.

Clinic Name: Valley Rehab **Telephone:** (623) 974-1797

Address: 13460 N 94th Dr., Suite G-1, Medical Center #2, Peoria, AZ 85381

Job Applying for: _____

GUIDELINES:

1. **MUST** eat or drink a carbohydrate based **light meal** or beverage **within 2 hours** of the assessment session. Fruit, candy, or juice is acceptable.
2. **DO NOT** smoke 2-4 hours prior to your appointment.

3. **Refrain** from excessive caffeine or recreational alcohol use prior to the session. Added **water intake** is preferred.

4. Dress in sweat clothes/casual exercise attire. **Tight fitting** street clothes **can limit** your true performance and cause discomfort.

5. As possible, **avoid intense exercise or lack of rest** 24 hours prior to the assessment session.

6. **Be aware** that an acute and/or aggravated injury, symptoms of severe illness, or pregnancy may require that the assessment be postponed.

WHAT IT IS.....SAFE!!!!

Your knee and shoulder muscles will be tested on state-of-the-art isokinetic equipment, identical to the type used for performance assessment of **pro-athletes!!!** The force producing capabilities of your muscles will be measured, not absolute strength. As you initiate movement on the speed controlled lever arm, the equipment resists your effort; therefore, this assessment is **not like** lifting weights. While performing the exercise movements, you will be stabilized and under the direct supervision of a trained clinician. Each assessment exercise lasts only 15-23 seconds per set. **You will be required to give maximum** effort during each set for accurate measurement of your true physical capability. For **ultimate safety** the equipment will accommodate to your fatigue by **immediately** reducing the resistance as your effort declines thus **limiting** the possibility of overexertion. As with any exercise normal muscle soreness may occur within

48 hours. If you experience prolonged soreness and/or pain, contact your physician. Further instruction will be given the day of your assessment.

8/2/2007

[Doc. 9-3]

EXHIBIT B

MORGAN, LEWIS & BOCKIUS LLP
Ronald E. Manthey, TX Bar No. 12927400
ron.manthey@morganlewis.com
Ellen L. Perlioni, TX Bar No. 00794155
ellen.perlioni@morganlewis.com
1717 Main Street
Suite 3200
Dallas, TX 75201-7347
Tel: 214.466.4000
Fax: 214.466.4001

Attorneys for Respondent
McLane Company, Inc.

UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

Equal Employment Opportunity Commission, Petitioner, vs. McLane Company, Inc., Respondent.	Case No. 2:12-mc-00007-GMS **DECLARATION OF SUZANNE H. STENSON IN SUPPORT OF RESPONDENT MCLANE COMPANY, INC.'S RESPONSE TO PETITIONER'S APPLICATION FOR ORDER TO SHOW CAUSE WHY ADMINISTRATIVE SUBPOENA SHOULD NOT BE ENFORCED**

DECLARATION OF SUZANNE H. STENSON

1. I, SUZANNE H. STENSON, declare as follows:

2. I have personal knowledge of the facts and matters set forth in this declaration and could and would testify competently and truthfully to the same if called as a witness and placed under oath. I am over 18 years of age.

3. I make this declaration in support of Respondent McLane Company, Inc.'s ("McLane") Response to Petitioners Application for Order to Show Cause why Administrative Subpoena Should Not be Enforced (the EEOC's Motion").

4. I am the Associate General Counsel for Respondent McLane Company, Inc. I have held this position since July 23, 2007. As the Associate General Counsel, I oversee and handle all employment-related legal issues for McLane and its related entities. I am the primary McLane attorney responsible for responding to charges and investigations by the EEOC, including the Subpoena at issue in the above-captioned matter.

5. On behalf of McLane, I retained Morgan, Lewis & Bockius, L.L.P. to represent the Company in relation to the EEOC's purported investigation of compliance under the Age Discrimination in Employment Act ("ADEA"). I have personally managed the defense and approved of all submissions to the EEOC. Based on my personal involvement, I have knowledge of the course of events described herein.

6. Prior to the ADEA subpoena at issue herein, McLane/Suneast, Inc., doing business in Goodyear, Arizona as McLane Sunwest ("McLane Sunwest"), received notice that the Phoenix office of the EEOC was investigating an individual charge of discrimination filed by Damiana Ochoa ("Ochoa") (the "Ochoa Charge") alleging sex and disability discrimination. On behalf of McLane Sunwest, I retained Snell & Wilmer L.L.P. to represent the company in relation to the Ochoa Charge. I have personally monitored and managed the defense of the Ochoa Charge and approved of all submissions to the EEOC. Based on my personal involvement, I have personal knowledge of the course of events described herein relating to the Ochoa Charge.

A. The EEOC's investigation of Ochoa's charge of gender/pregnancy and disability discrimination.

7. In early 2008, I received a copy of the Ochoa Charge against McLane Sunwest. In her charge of sex and disability discrimination, Ochoa alleges as follows:

> On or about August 28, 2007, I began maternity leave. My doctor released me to return to work on or about October 31, 2007. I was advised by Stephanie (last name unknown), Human Resources, that before returning to work, I had to take an agility test (physical capability strength test.) On or about November 1, 2007, I took the test and did not pass. On or about November 19, 2007, and December 28, 2007, I retested and did not pass. I have worked for the above-named employer for over eight years as a cigarette selector.
>
> I believe I have been discriminated against because of my sex, female, (pregnancy) in violation of Title VII of the Civil Rights Act of 1964, as amended.
>
> The physical capability strength test is given to all employees returning to work from medical leave and all new hires, regardless of job position. I believe the test violates the Americans with Disabilities Act of 1990, as amended.

A true and correct copy of the Ochoa Charge is attached as **Exhibit 1**. McLane Sunwest denies Ochoa's

allegations of discrimination in their entirety and provided EEOC Investigator Barbara Rusden ("Rusden") with evidence showing that Ochoa had been treated in accordance with the policy at McLane Sunwest that all newly hired employees, as well as all employees away from their jobs for more than 30 days, must take the IPCS PCE[1] to ensure they are qualified (have the strength capability) to safely perform the essential functions of any position identified as physically demanding.[2] The IPCS PCE is an objective isokinetic evaluation provided, analyzed, and validated by third parties, and the policy applies to all employees returning from leave of more than 30 days regardless of the reason for the leave.

8. McLane Sunwest cooperated with Rusden's investigation of Ochoa's Charge, including submitting a position statement and responding to several additional information requests. McLane Sunwest also permitted representatives of the Phoenix EEOC office to conduct an on-site visit of its facility, and agreed to the interview of Theresa Hatch, McLane Sunwest's Human Resources Manager, and Janann Williams, McLane's Vice President, People.

9. Beginning in 2009, however, representatives of the Phoenix EEOC office have sought information

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[1] IPCS PCE refers to a physical capability exam ("PCE") conducted by third-party health care providers and interpreted by Industrial Physical Capability Services, Inc. ("IPCS").

[2] These positions, or exemplar positions, were analyzed by third-party ergonomic experts of a company called General Management Solutions, Inc. ("GMSI").

well beyond Ochoa's allegations. A true and correct copy of a letter dated August 24, 2009 from Rusden requesting information regarding the Ochoa Charge is attached as **Exhibit 2**. Although Ochoa alleged only gender and disability discrimination relating to her attempt to return to work at McLane Sunwest, Rusden sought broad nationwide information regarding all facilities, and regarding age—none of which was alleged by Ochoa.[3] (In fact, according to her EEOC Charge, Ochoa is under the age of 40 and she only worked for McLane Sunwest, a Grocery facility.)[4] Rusden also sought job descriptions for every position at McLane and sought a database of information for any individual employed by McLane since 2006—regardless of whether IPCS PCE was required for their position.[5] As such, through counsel, McLane Sunwest responded, limiting the information provided to the scope of Ochoa's Charge. A true and correct copy of the response letter dated November 13, 2009 is attached as **Exhibit 3**.

B. <u>The EEOC "expands" its investigation of Ochoa's Charge.</u>

10. In response to the limited response to the requests because they exceeded the scope of the Ochoa

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[3] See requests for information 5 and 12 seeking dates of birth.

[4] See Exhibit 1.

[5] See requests for information 6 and 12.

Charge, McLane received a letter from District Director Rayford O. Irvin ("Irvin") stating that the EEOC was investigating Ochoa's Charge, in conjunction with McLane's nationwide "ADEA compliance"—and requesting the same nationwide data previously sought under the Ochoa Charge. A true and correct copy of Irvin's letter and accompanying request for information is attached as **Exhibit 4**. As indicated on page 1 of the request for information, Irvin simply added an additional charge number above the Ochoa Charge number. Surprisingly, Irvin also asked for a copy of any liability insurance that would provide coverage for "the claims asserted in these charges."[6]

11. In a letter from its counsel dated September 3, 2010, McLane made clear that it was willing to cooperate with any reasonable investigation conducted by the EEOC, but pointed out that the EEOC never provided McLane a copy of the purported new charge or any other notice of the purported ADEA allegations warranting an expanded nationwide investigation of ADEA compliance. McLane also raised concerns with the intermingling of this new ADEA charge and Ochoa's Charge and the timing coming on the heels of objections to the investigation exceeding the scope authorized by Title VII and the ADA. McLane asked the EEOC for an explanation of the basis for investigating nationwide ADEA compliance, including providing a copy of the purported ADEA charge referenced. A true and correct copy of the letter is attached as **Exhibit 5**.

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[6] See request number 3.

12. In a letter from its counsel dated September 3, 2010, McLane Sunwest similarly made clear that it was willing to cooperate with any reasonable investigation conducted by the EEOC, but pointed out that Ochoa only alleged sex and pregnancy discrimination, not age discrimination, and that she was under forty and not covered by the ADEA—providing no support for an age investigation in relation to her charge. A true and correct copy of the letter is attached as **Exhibit 6**.

13. Rusden responded to McLane's counsel that the EEOC may initiate an ADEA investigation at any time and that the EEOC would split the two "charges" and send separate information requests. The EEOC refused to provide McLane with a copy of the purported ADEA charge (identified as Charge No. 540-2010-01761) or any other notice of the purported ADEA allegations or issues warranting a nationwide "compliance" investigation. A true and correct copy of Rusden's letter dated November 8, 2010 is attached as **Exhibit 7**.

14. Rusden also apologized for "intermingling" the Ochoa Charge and the EEOC's purportedly separate investigation of ADEA compliance and sent a separate, but virtually identical, request relating to the Ochoa Charge. A true and correct copy of Rusden's letter dated November 9, 2010 is attached as **Exhibit 8**. (Compare Exhibit 7 and Exhibit 8).

15. On December 7, 2010, through counsel, McLane again wrote the EEOC expressing its willingness to cooperate, but seeking clarification as to the EEOC's significant request for information regarding McLane's nationwide employment practices and its ADEA compliance. A true and correct copy of the letter is attached as **Exhibit 9**.

16. On December 11, 2010, counsel for McLane again wrote to the EEOC offering to cooperate and suggesting an alternative, less burdensome production focusing initially on the validity of the IPCS PCE. A true and correct copy of the letter is attached as **Exhibit 10**.

17. On January 12, 2011, Rusden responded to messages and contacted counsel for McLane by telephone. Upon information and belief, it is my understanding that Rusden stated that the new EEOC ADEA "charge" was "just a number" added to the ongoing Title VII investigation and that there is no actual charge of age discrimination, no charging party, and no commissioner's charge. Rather, upon further information and belief, the Phoenix office of the EEOC had decided to expand the Ochoa investigation into an ADEA investigation of McLane Company, encompassing all related entities nationwide—even distinct, separate corporations. Moreover, although asked, Rusden stated that the EEOC was not willing to explain the basis for this Phoenix EEOC-initiated investigation or why it was warranted or justified—particularly given that no age-related information had been provided to the EEOC on which it could even have a suspicion of

an issue with ADEA compliance—or why the EEOC was seeking the same information requested in the Ochoa investigation as part of this purported compliance review. Upon information and belief, Rusden further commented that the EEOC was looking for "victims." This conversation was documented and confirmed in a follow-up letter from McLane's counsel. A true and correct copy of the letter is attached as **Exhibit 11**.

C. McLane Proposed Less Burdensome Alternative Production.

18. On January 19, 2011, counsel for McLane again wrote to the EEOC at my direction. A true and correct copy of the letter is attached as **Exhibit 12**. McLane explained that the commingling of the requests and the circumstances under which the new charge arose gave the appearance of an effort to evade the statutory limitations on the EEOC in its investigation of Ms. Ochoa's Charge. Although it had significant questions as to the legitimacy of this new "charge number," and objected to the far reaching and overly broad requests for information relating thereto, McLane made clear that it would continue to cooperate with legitimate requests. McLane suggested having a more frank discussion of the EEOC's concerns, explaining that its goal was to better understand the EEOC's inquiry and to determine whether a more manageable compilation of data would be sufficient to allay any legitimately raised concerns the EEOC may have had, McLane suggested an initial focus on the validity and

legitimacy of the IPCS PCE because such an inquiry could obviate any need to add new statutes to any investigation and possibly avoid the EEOC's unduly burdensome requests. As McLane noted, if the IPCS PCE is valid, much of the burden of compiling the information sought by the EEOC would be unnecessary.

19. Instead of engaging in any discussion as McLane requested, Irvin issued almost identical subpoenas purportedly relating to the ADEA investigation and relating to the Ochoa Title VII and ADA charge. A true and correct copy of the ADEA Subpoena is attached as **Exhibit 13**. A true and correct copy Ochoa Subpoena is attached as **Exhibit 14**.

20. On February 22, 2011, McLane Sunwest petitioned the EEOC to revoke the subpoena issued in relation to the Ochoa Charge. A true and correct copy of the petition to revoke the Ochoa subpoena is attached as **Exhibit 15**. The EEOC has not moved to enforce the Ochoa subpoena.

D. <u>While Maintaining Its Objections, McLane Has Provided Significant Information In Response To The Subpoena.</u>

21. The EEOC has never offered any explanation or justification for its purported ADEA nationwide investigation. The only information McLane has been given in its efforts to engage the EEOC in discussions relating to the basis for the EEOC's ADEA investigation was Investigator Rusden's comment to counsel for

McLane that the EEOC was "looking for victims"—even before it received *any* age-related information,

22. Given the circumstances, McLane petitioned the EEOC for the revocation of the Subpoena or other such administrative reconsideration or withdrawal. A true and correct copy of the petition is attached as **Exhibit 16**. In its Petition and despite its concern that the EEOC was improperly using its ADEA authority to subvert its more limited Title VII authority, McLane still showed cooperation and asked the EEOC to consider some preliminary data—without waiver of either party's position as to the legitimacy of the investigation or as to the full scope of the Subpoena. McLane again offered to produce data establishing the validity of the IPCS test.

23. The Phoenix EEOC never responded to the substantive arguments in the petition to revoke the Subpoena at issue herein. Rather, Irvin simply threatened immediate enforcement action if McLane intended not to comply with the Subpoena. A true and correct copy of Irvin's letter is attached as **Exhibit 17**.

24. Notwithstanding its concerns and without waiving its objections, McLane submitted a supplemental response to the Subpoena that included a substantial amount of information and documents. A true and correct copy of the supplemental response to the Subpoena is attached as **Exhibit 18**. Included with its response, McLane produced relevant information regarding all individuals who have participated in the

IPCS PCE in relation to Grocery jobs at all Grocery facilities nationwide. This information included identification numbers for each person taking the IPCS PCE, location where they worked, age as of the date of the test, reason for taking the test, position sought, physical capability level achieved, and whether the physical capability achieved met the minimum requirement for the particular position, among other things. McLane also produced validation studies showing the reduction of workplace injuries since the implementation of the IPCS PCE, among many other things.

25. On March 25, 2011, Irvin issued two additional identical subpoenas, one to McLane Sunwest purportedly under Title VII (attached as **Exhibit 19**) and one to McLane purportedly under the ADEA (attached as **Exhibit 20**). Both subpoenas requested testimony regarding the implementation of the IPCS PCE at the separate corporation McLane Foodservice, Inc. ("Foodservice"). As previously noted, McLane had already provided the EEOC the opportunity to interview Janann Williams regarding the decision to implement the IPCS PCE at McLane Sunwest (where Ochoa worked) and the other Grocery facilities.

26. By letter dated April 8, 2011, counsel for McLane objected to the subpoena seeking testimony relating to a separate corporate entity and using the purported ADEA investigation to exceed the scope of its authority under the Title VII investigation of the Ochoa Charge. A true and correct copy of the letter is attached as **Exhibit 21**. McLane further asked the EEOC for the opportunity to discuss the validity of the

IPCS PCE and the lack of adverse disparate impact and, given such, whether the EEOC deemed any additional data necessary for it to complete its investigation. McLane emphasized to the EEOC that if it had concerns with the IPCS PCE, or suggestions as to the use of the IPCS PCE, the company genuinely wanted to hear them. McLane's primary goal has always been to employ people who are qualified to safely perform the essential functions of these physically demanding positions.

27. In response, the EEOC finally agreed to meet with McLane for discussion. Because I hoped the EEOC was equally committed to substantive discussions, I personally flew to Arizona, as did McLane's counsel from Morgan Lewis, to attend the meeting offered by EEOC representatives which occurred on August 25, 2011. Unfortunately, despite our good faith efforts and expense, the representatives of the Phoenix EEOC refused to engage in any substantive discussions regarding the merits of the IPCS PCE or the lack of ADEA disparate impact. The EEOC also refused to substantively confer as to the Subpoenas and the relevance of the information. sought. Rather, the meeting was nothing more than a one-sided questioning by the Phoenix EEOC representatives of whether and to what extent McLane would further capitulate to the requests in the Subpoenas.[7]

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[7] McLane Sunwest representatives, including myself and counsel from Snell & Wilmer, and EEOC representatives also met

28. In an effort to further cooperate with the EEOC, McLane submitted supplemental responses with additional information and additional document production on December 6 and again on December 22, 2011. True and correct copies of the letters are attached as **Exhibits 22 and 23**. McLane provided further supplemental information on January 31, 2012, and is continuing to review and provide information as available. A true and correct copy of the letter is attached as **Exhibit 24**. The Phoenix EEOC responded with initiating this lawsuit to enforce the Subpoena Irvin issued.

29. By letter dated January 11, 2012, Irvin notified McLane that the Phoenix EEOC had decided to "re-open" a charge that had been filed by Sunny A. Abraham on October 30, 2009 (the "Abraham Charge"). A true and correct copy of the letter is attached as **Exhibit 25**. I am familiar with the circumstances surrounding the Abraham Charge as I similarly managed the response to the charge as counsel for McLane. A true and correct copy of the Abraham Charge is attached as **Exhibit 26**. Abraham had alleged disability discrimination under the ADA and race discrimination under Title VII. The Abraham Charge had been investigated by Rusden and dismissed with no finding of reasonable cause by Irvin in September 2010—all while the Ochoa charge was pending. A true and correct copy of the EEOC's dismissal of the Abraham

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on August 24, 2011, to discuss the Ochoa Charge and the subpoena Irvin issued relating thereto. The meeting relating to the Ochoa Charge was equally one-sided and non-productive.

Charge is attached as **Exhibit 27**. The Abraham Charge had nothing to do with the IPCS PCE, contained no allegation of age discrimination, and was invalid on its face as it was filed well beyond the statutory 300-day deadline for filing EEOC charges.[8] To McLane's knowledge, Irvin reopened the Abraham Charge with no new evidence or intervening act warranting further investigation of Abraham's allegations.

30. The day after Irvin's letter regarding the Abraham Charge, Irvin sent another letter notifying McLane that the Phoenix EEOC was reopening another charge—from Minnesota—filed by Jorge Evasku on June 14, 2010 ("Evasku Charge"). A true and correct copy of the letter is attached as **Exhibit 28**. I am familiar with the circumstances surrounding the Evasku Charge as I similarly managed the response to the charge as counsel for McLane. A true and correct copy of the Evasku Charge is attached as **Exhibit 29**. The Evasku Charge was filed with and investigated by the Minnesota Department of Human Rights (MDHR"). Evasku had alleged disability discrimination under the ADA. The Evasku Charge had nothing to do with the IPCS PCE and contained no allegation of age discrimination.[9] Through the MDHR's mediation program, the Evasku Charge had previously been

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[8] Abraham's Charge states on its face that his employment was terminated on October 14, 2008; yet he did not file the Charge until October 30, 2009.

[9] In fact, Evasku admits that following his leave, he took the IPCS PCE and achieved the physical capability needed to meet the minimum requirements for his position, and was returned to work. *See* Exhibit 29.

resolved by mutual agreement, with the MDHR stating: "This case has been dismissed with prejudice and the Department's case has been closed as satisfactorily adjusted." A true and correct copy of the letter is attached as Exhibit 30. To McLane's knowledge, Irvin similarly re-opened this Minnesota Charge with no evidence or intervening act warranting further investigation.

31. On January 19, 2012, Irvin issued another subpoena virtually identical to the one before this Court, to McLane Foodservice, Inc. Again, the Phoenix EEOC proclaims to be independently investigating "ADEA compliance" under its own authority. A true and correct copy of the letter and subpoena to McLane Foodservice is attached as **Exhibit 31**. As before, the Phoenix EEOC seeks nationwide contact information for current and former employees and applicants of McLane Foodservice. As before, the Phoenix EEOC offers no basis for this purported charge against a separate corporate entity.

32. On February 6, 2012, Irvin issued two more identical subpoenas: one purportedly pursuant to Title VII and the ADA, and the other purportedly pursuant to the ADEA. True and correct copies of the letters are attached as **Exhibits 32 and 33**.

33. On February 13, 2012, McLane Sunwest responded to the February 6 Subpoena issued under Title VII and the ADA with a petition to revoke in which it agreed to respond to most of the requests, but objected to and sought modification of certain requests

contained therein. A true and correct copy of the McLane Sunwest's petition to revoke the February 6 subpoena is attached as **Exhibit 34**. McLane's deadline to respond to the February 6 ADEA subpoena is February 22, 2012.

34. In addition, several McLane Sunwest teammates have noted that they received letters from the [sic] Rusden. Attached as **Exhibit 35** is a true and correct copy of a letter provided to us by teammate Lydia Romero. I was also notified that Rusden attempted to contact a management level employee. Finally, another McLane/Suneast, Inc. teammate in northern California informed me that Rusden called her and was very insistent that she provide the name and phone number for a friend of hers that is a former teammate of McLane Suneast/Inc.. Rusden informed this teammate that the information was necessary because she was investigating pregnancy discrimination relating to the PCE.

35. I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on February 17, 2012, at Temple, Texas.

/s/ Suzanne H. Stenson
SUZANNE H. STENSON

* * *

[Doc. 9.4]

EXHIBIT 8

[SEAL] **U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION**
Phoenix District Office

3300 N. Central Avenue, Suite 690
Phoenix, AZ 85012-2504
(602) 640-5000
TTY (602) 640-5072
FAX (602) 640-5071

November 9, 2010

Ashley T. Kasarjian
Snell & Wilmer
400 East Van Buren Street
Suite 1900
Phoenix, AZ 85004-2202

RE: Charge No. 540-2008-01093
Ochoa v. McLane Sunwest

Dear Ms. Kasarjian:

This is in response to your letter dated September 3, 2010. Please accept my apologies for any confusion caused by the intermingling of two separate charges in the Equal Employment Opportunity Commission's (Commission) Request for Information mailed to Bobby Carlson, President of McLane Sunwest, on August 6, 2010.

This is to also notify you that the Commission has made a decision to broaden the scope of its investigation for the above-referenced charge to all McLane facilities/locations nationwide.

The enclosed Request for Information corrects and replaces the Request for Information mailed to Mr. Carlson on August 6, 2010. Your response to the enclosed Request for Information is due **on or before December 1, 2010**.

Should you have any questions regarding this request, I can be reached at (602) 640-5054.

Sincerely,

/s/ Barbara Rusden
Barbara Rusden
Investigator

cc: Joshua R. Woodard

REQUEST FOR INFORMATION
Ochoa v. McLane Sunwest
Charge No. 540-2008-01093

Relevant time period: January 1, 2006 to present date

Respondent: McLane Company, Inc. (all facilities/ locations nationwide including corporate)

1. Submit the name, title, address and telephone number of the person to whom further inquiries regarding this charge should be directed.

2. Provide the correct legal name and business address of the Respondent named in the charge and describe the nature of Respondent's business, Include any and all trade names, d/b/a's, or former names. Also include documentation either already in existence or prepared by Respondent in response to this request that describes or provides the following information:

   a. the type of corporate or business entity

   b. approximate number of employees during calendar years 2007 and 2008

   c. location of corporate headquarters

   d. current status of the corporation, i.e. active, inactive, or another status

   e. the name of Respondent's corporate officers, directors, and owners

   f. the statutory agent for Respondent in Arizona

   g. the relationship between Respondent and any superior and subordinate business entities, including, but not limited to, any parent entity, subsidiaries, branches, or affiliates.

      i. Provide the legal name and business address of all superior and subordinate business entities identified.

      ii. Provide the statutory agent for all superior and subordinate business entities identified.

3. Does the Respondent have a policy of liability insurance that will provide coverage for the claims

asserted in this charge? If so, please provide a copy of the policy.

4. Submit a copy of any employee handbook in effect during the relevant time period and

   a. explain in detail how this information is disseminated to employees, and

   b. provide the date when any employee handbook went into effect, and the dates of any revisions.

5. List each test used by Respondent during the relevant time period, including but not limited to Industrial Physical Capability Strength test (IPCS) and Isokinetic Physical Capability Test (IPCT), and list any variations of each test in use.

   a. For each test variation listed, identify all jobs or job classifications for which it has been used.

6. For each test or variation (including variations arising from modifications to the test made by Respondent) identified in #5 above, and used by any facility of Respondent, including but not limited to IPCS and IPCT:

   a. describe how the test was developed and how it is used by Respondent,

   b. provide the name of each test's or variation's author or creator; the original publication or creation date of the test or variation; and the jobs, employer, or industry for which the test or variation was originally designed,

c. describe the process that led to Respondent's implementation of each test or variation, including the names and titles of all key decision makers involved in the process. Include all correspondence, including e-mails exchanged, relating to the decision to implement the test at each of Respondent's locations. Include any and all documents reviewed by any key decision makers in addition to paragraph 7 below,

d. specify the effective dates of use of each test or variation at each of Respondent's locations,

e. provide any and all internal regulations or guidelines regarding each test or variation, including any and all regulations or guidelines for individual(s) who administer the test and individual(s) who take the test,

f. provide a description of how each test or variation is administered and scored. Include a description of each stage of the process (e.g., application process if the test is used in an employee selection context; or process by which employees are deemed eligible to return to work if the test is required of employees returning to work after an extended leave), the point at which the test is administered in this process, the physical setting in which the test is administered, and the name and position of the person(s) who administer and score the test(s).

g. provide a list of all jobs and job classifications for which any test or variation is used;

h. for each job or job classification for which a test or variation is used, identify the specific test

or variation (listed in response to paragraph 5) used for that job or job classification,

i. for each job or job classification for which a test or variation is used, identify the score(s) that are considered "passing" and "failing", or any other rating classification used, provide details on the process by which any scoring/classification system was established, and provide details about the process by which Respondent determined the minimum score considered "passing."

j. for each job or job classification for which a test or variation is used, provide job descriptions.

k. provide copies of any and all adverse impact studies performed for each test or variation.

7. Provide copies of any and all validation studies or validation evidence relating to the use of all tests or variations identified in #5 and #6 above, to include any notes or other documents concerning development and implementation of the test by Respondent.

8. For all positions at Respondent's facilities/ locations nationwide for which any test or variation identified in #5 and #6 above is used, provide the Job Task Analysis for each position. Include:

a. a list of all subject matter experts who were consulted regarding the Job Task Analysis, including name and job title, and

b. any documents containing job analysis information for all positions wherein testing is applied to employees and/or new hires.

9. For the relevant time period, provide documents or a listing* of information identifying all persons who took any test or variation identified in #5 and #6 in connection with employment at any of Respondent's locations or facilities nationwide. Provide a separate list for each facility/location nationwide and annotate the list by:

   a. name

   b. social security number

   c. last known home address and telephone number

   d. sex

   e. medical condition

   f. date of application

   g. date of hire (or promotion), and job classification at hire (or promotion)

   h. test date, test score (overall test score and any and all sub-test scores), name of test administered, test result (pass, fail, or other classification)

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* The data should be provided on compact disk. It may be written in one of the following formats: Excel, Access or ASCII delimited ("csv"). Other formats may be acceptable if approved by the EEOC prior to submission. Regardless of format, EEOC asks that the first row consist of the field or variable names with subsequent rows for employee observations without blanks or repeating variable names or titles. There should be one column for each variable requested.

i. position held at the time test was administered (for individuals employed at the time or returning to work)

j. position sought at the time test was administered (for individuals returning to work or seeking promotion or hire)

k. reason why test was administered to each person tested

l. date and reason for termination (if applicable)

m. name and job title of any individual(s) responsible for the hiring, promotion, or termination decisions based on test results for each person who took any test or variation.

10. Provide a list of all Respondent's facilities and locations in existence during the relevant time period.

11. For all Respondent facilities/locations nationwide during the relevant time period and with respect to any test or variation identified in #5 and #6 above, provide documents or a list* of information identifying all persons by name, last known home address and telephone number, and social security number, who were:

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* The data should be provided on compact disk. It may be written in one of the following formats: Excel, Access or ASCII delimited ("csv"). Other formats may be acceptable if approved by the EEOC prior to submission. Regardless of format, EEOC asks that the first row consist of the field or variable names with subsequent rows for employee observations without blanks or repeating variable names or titles. There should be one column for each variable requested.

a. terminated because of an inability to pass any test or variation,

b. reassigned and/or transferred because of an inability to pass any test or variation,

c. not hired because of an inability to pass any test or variation,

d. not promoted because of an inability to pass any test or variation,

12. For each person identified in 11(a) through 11(d), provide:

a. date of termination, reassignment, transfer, not hired or not promoted,

b. name and title of the individual who made the decision to terminate, reassign, transfer, not hire and/or not promote the person based on test results.

13. For each test or variation identified in #5 or #6, provide any and all evidence which shows any change, whether a reduction or increase, in workplace injuries.

14. During the relevant time period, if Respondent received any formal or informal complaints by any employee other than Charging Party concerning the test(s), or any claims of discrimination based on sex and/or disability, submit the following:

a. name and job title of each person who complained,

b. name and job title of each person receiving each complaint,

c. date of each complaint,

d. any and all formal and informal written record reflecting the complaint and the name and position title of the person who is subject of the complaint,

e. record of all actions taken by your organization in response to each complaint, including copies of all remedial actions taken.

15. Provide a list* of all individuals who applied for a position, for which the test identified in #5 and #6 above was in use, at any location or facility of Respondent during the relevant time period. Annotate the list by:

a. name

b. social security number

c. last known home address and telephone number

d. sex

e. medical condition(s)

f. date of application

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* The data should be provided on compact disk. It may be written in one of the following formats: Excel, Access or ASCII delimited ("csv"). Other formats may be acceptable if approved by the EEOC prior to submission. Regardless of format, EEOC asks that the first row consist of the field or variable names with subsequent rows for employee observations without blanks or repeating variable names or titles. There should be one column for each variable requested.

g. whether the applicant was hired, and date and reason for hire or non-hire

h. location at which they applied and

i. position for which they applied.

16. Provide a list* of all individuals who sought promotion or were selected for promotion to a position, for which the test identified in #5 and #6 above was in use, at any and [sic] location or facility of Respondent during the relevant time period. Annotate the list by:

a. name

b. social security number

c. last known home address and telephone number

d. sex

e. medical condition(s)

f. date promotion sought

g. whether the individual seeking promotion was selected, and, if so, date and reason for selection or non-selection

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* The data should be provided on compact disk. It may be written in one of the following formats: Excel, Access or ASCII delimited ("csv"). Other formats may be acceptable if approved by the EEOC prior to submission. Regardless of format, EEOC asks that the first row consist of the field or variable names with subsequent rows for employee observations without blanks or repeating variable names or titles. There should be one column for each variable requested.

h. location at which they sought promotion and

i. position for which they sought promotion.

17. Provide a list* of all individuals who were employed by Respondent at any location or facility nationwide during the relevant time period. Provide a separate list for each facility/location nationwide and annotate the list by:

a. name

b. social security number

c. last known home address and telephone number

d. sex

e. medical condition(s)

f. date of hire

g. all position titles held

h. dates when each position title was held

i. termination date and reason, if applicable.

18. Provide a complete copy of Charging Party's personnel file, including but not limited to all documents relating to applications for employment,

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* The data should be provided on compact disk. It may be written in one of the following formats: Excel, Access or ASCII delimited ("csv"). Other formats may be acceptable if approved by the EEOC prior to submission. Regardless of format, EEOC asks that the first row consist of the field or variable names with subsequent rows for employee observations without blanks or repeating variable names or titles. There should be one column for each variable requested.

pay history and wages, job titles and job duties, work performance, evaluations, commendations, complaints made by her, complaints made about her, write-ups, warnings, counselings, disciplinary action, personnel action forms, communication logs, termination, and reasons for separation or termination and Charging Party's medical file, including but not limited to test scores or results, documentation from treating physicians, documentation from non-treating physicians, and medical or physical evaluations by Respondent's personnel.

19. Provide complete copies of the personnel files, including but not limited to all documents relating to applications for employment, pay history and wages, job titles and job duties, work performance, evaluations, commendations, complaints made by him or her, complaints made about him or her, write-ups, warnings, counselings, disciplinary action, personnel action forms, communication logs, termination, and reasons for separation or termination for Bobby Carlson (President), Theresa Hatch (Human Resources Manager) and Janann Williams (Vice President, People)

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* * *

[Doc. 9-5]

EXHIBIT 18

Morgan, Lewis & Bockius LLP
1717 Main Street, Suite 3200
Dallas, TX 75201-7347
Tel: 214.466.4000
Fax 214.466.4001
www.morganlewis.com

Morgan Lewis
COUNSELORS AT LAW

Ellen L. Perlioni
Partner
214.466.4142
ellen.perlioni@MorganLewis.com

March 9, 2011

VIC CM RRR AND
FAX 1 602 640 5071

Rayford O. Irvin
District Director
Phoenix District Office
Equal Employment Opportunity Commission
3300 N. Central Avenue, Suite 690
Phoenix, AZ 85012-2504

Re: EEOC v. McLane Company
Charge No.: 540-2010-01761
Supplemental Response to Subpoena
No. PHX-11-33 ("Subpoena")

Dear Mr. Irvin:

As discussed more fully in its Petition to Revoke the above-referenced Subpoena, McLane Company, Inc. ("McLane") has legitimate concerns with the Subpoena given the circumstances and given the breadth of information sought. Notwithstanding its concerns,

McLane has consistently expressed a willingness to cooperate with the EEOC and has made efforts to confer with EEOC officials to facilitate the EEOC's investigation, while minimizing the burden of production. McLane has offered to provide the EEOC with targeted data in an attempt to alleviate its concerns through less burdensome and more focused means. McLane remains committed to engaging in such discussions and cooperating with the EEOC—without waiving its objections to the EEOC's investigation and information requests.

Without waiving its general and specific objections previously submitted in its Petition for Revocation, which are hereby incorporated herein by reference, McLane provides the following supplemental response to the Subpoena.

As previously explained, McLane has been left in the dark as to the EEOC's self-initiated investigation. In fact, the only information McLane has been given as to the basis for the EEOC's investigation is Investigator Rusden's comment that the EEOC is "looking for victims"—inferring that the EEOC has already decided (without having received any age-related information) that discrimination is occurring and individuals over 40 have been "victimized."

To the contrary, we have analyzed data relating to all individuals who have taken the IPCS exam for grocery positions and it clearly reveals that the IPCS exam does not disparately impact individuals over 40. With regard to all grocery operations, 3,019 individuals over

the age of 40 and 9,072 under the age of 40 participated in the IPCS exam. Approximately 77% of those over the age of 40 met the minimum requirements for the position. Similarly, approximately 85% of those under 40 met the minimum requirements.

Pursuant to the requests below, McLane is producing relevant information regarding all individuals who have participated in the IPCS exam in relation to grocery jobs. (*See* enclosed CD).[1] McLane is also producing validation studies showing the reduction of workplace injuries as a result of the IPCS exam. Finally, McLane is working on compiling and analyzing further injury data and expects to have that to the EEOC in the near future once it can be gathered and collated.

Although it continues to object to certain requests, McLane believes the information it is providing should dispel any concerns the EEOC may have. To the extent additional data is deemed necessary for the EEOC to complete its investigation, we would appreciate the opportunity to confer as to an appropriate scope of any such information. Finally, McLane remains willing to discuss the validity of the IPCS exam as its sole desire is to utilize an appropriate method for meeting its business needs with employees capable of safely performing the job requirements.

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[1] The "Age" column reflects the individual's age on the date tested. Those with no age data or with "0" did not provide the information when participating in the exam.

McLane further supplements its response to the specific subpoena requests, without waiver of its objections, as follows:

1. Documents which reflect the name, title, address and telephone number of the person to whom further inquiries should be directed.

Response: All further inquiries regarding this matter should be directed to Ellen L. Perlioni at the address and/or email provided on this letter, as well as Ronald E. Manthey, at the same address or the following email: ron.manthey@morganlewis.com.

2. Documents which reflect the correct legal name and business address of the Respondent and describe the nature of Respondent's business. Include any and all trade names, d/b/a's, or former names. Also include documentation either already in existence or prepared by Respondent in response to this request that describes or provides the following information:

a. the type of corporate or business entity

b. approximate number of employees during each calendar year during the relevant time period

c. location of corporate headquarters

d. current status of the corporation, i.e. active, inactive, or another status

e. the name of Respondent's corporate officers, directors, and owners

f. the statutory agent for Respondent in Arizona

g. the relationship between Respondent and any superior and subordinate business entities, including, but not limited to, any parent entity, subsidiaries, branches, or affiliates.

i. Provide the legal name and business address of all superior and subordinate business entities identified.

ii. Provide the statutory agent for all superior and subordinate business entities identified.

Response: In response to the EEOC's request regarding Ochoa's Charge, McLane Sunwest provided information regarding McLane/Suneast, Inc. (a/k/a McLane Sunwest.) McLane provided further information in its Petition to Revoke the Subpoena. McLane supplements these responses as follows:

McLane Company, Inc. is an active Texas corporation. The address for McLane Company, Inc. is P.O. Box 6115, Temple, Texas 76503. Its statutory agent is CT Corporation. At all relevant times, McLane has employed in excess of 500 teammates.

3. Documents which reflect liability insurance that will provide coverage for this charge.

Response: McLane objects to this request as liability insurance is irrelevant to any legitimate investigation the EEOC could be conducting. Liability insurance has nothing to do with legal compliance. The fact that the EEOC seeks information regarding liability insurance suggests that the EEOC is posturing for litigation prior to any investigation or conciliation efforts.

4. Submit copies of any and all employee handbooks in effect from January 1, 2006 to the present and

a. provide documents which reflect in detail how this information is disseminated to employees, and

b. provide documents which reflect the date when any employee handbook went into effect, and the dates of any revisions,

Response: McLane objects to this request as irrelevant, overly broad, unduly burdensome and seeking solely to harass the Company. McLane further objects to this request as seeking confidential information. Seeking handbooks in their entirety and applicable to every separate but somehow related entity constitutes a fishing expedition. McLane further objects to the temporal scope and the lack of geographic scope.

Subject to its objections and the Petition for Revocation, McLane is producing the following policies applicable to grocery operations: EEO Policy (MCLANE 1-3); EEO Handbook Provision (MCLANE 4); Safety Policy (MCLANE 5); and Pre/Post Employment Physical Requirements Policy (MCLANE 6-8). McLane is also producing:

Bates No.	Effective Date	Policy/Provision
MCLANE 301	July 2005	Equal Employment Opportunity
MCLANE 302	September 2008	
MCLANE 303	January 2010	
MCLANE 304	February 2010	
MCLANE 305	September 2010	
MCLANE 306-307	July 2005	Harassment/ Sexual Harassment/ Investigating and Resolving Complaints
MCLANE 308-309	September 2008	
MCLANE 310-311	January 2010	
MCLANE 312-313	February 2010	
MCLANE 314-315	September 2010	
MCLANE 316	July 2005	Safety
MCLANE 317	September 2008	

MCLANE 318	**January 2010**	
MCLANE 319	**February 2010**	
MCLANE 320	**September 2010**	
MCLANE 321-323	**July 2005**	**Leave of Absence**
MCLANE 324-327	**September 2008**	
MCLANE 328-332	**February 2009**	
MCLANE 333-337	**January 2010**	
MCLANE 338-342	**February 2010**	
MCLANE 343-347	**September 2010**	
MCLANE 348	**July 2005**	**Communication and Conduct**
MCLANE 349	**September 2008**	
MCLANE 350-351	**July 2009**	
MCLANE 352-353	**January 2010**	
MCLANE 354-355	**February 2010**	
MCLANE 356-358	**September 2010**	

The Employee Handbooks are provided to employees upon hire and also following any substantial revisions. Employees receive notification of all minor revisions to

individual policies, and the Handbooks are always available on the Company's internal network, eSERVE.

5. Documents which reflect or a list identifying each test used by Respondent from January 1, 2006 to the present, including but not limited to Industrial Physical Capability Strength test (IPCS) and Isokinetic Physical Capability Test (IPCT), and provide documents which reflect any variations of each test in use

a. For each test variation, provide documents which reflect or a list which identifies all jobs or job classifications for which it has been used,

b. List all alternative names used to describe or refer to each test and variation.

Response: McLane objects to this request as irrelevant, overly broad, unduly burdensome and seeking solely to harass the Company. McLane objects to this request and certain terms used therein as vague and ambiguous—particularly the EEOC's use of the terms "test" and "variation." McLane objects to this unlimited request for any and all testing as a fishing expedition constituting an abuse of process by the EEOC.

As indicated on multiple occasions, McLane has been willing to provide information to allow the EEOC to analyze the validity of the IPCS exam prior to the burden and expense of production of the vast amount of information sought on a nationwide basis as to every separate but somehow related entity. McLane suggests

a staged and less burdensome process to facilitate the EEOC's investigation.

McLane further notes that in response to Ochoa's charge, McLane Sunwest produced detailed information regarding the IPCS test in its position statement, dated April 25, 2008 and the response to the First RFI, dated November 13, 2009, as well as at the interviews of Theresa Hatch, Human Resources Manager, on March 9, 2010, and Janann Williams, Vice President, People, on August 5, 2010, McLane Sunwest produced additional information and data in response to the second Request for Information.

To facilitate the EEOC's analysis, McLane is producing additional information herewith, including information regarding all individuals who took the IPCS exam in relation to grocery positions. (*See* enclosed CD). Given the data clearly shows no disparate impact on individuals over the age of 40, it should dispel any concerns the EEOC may have relating to the ADEA.

6. For each test or variation (including variations arising from modifications to the test made by Respondent) identified in #5 above, and used by any facility of Respondent, including but not limited to IPCS and IPCT:

a. provide documents which reflect how the test was developed and how it is used by Respondent,

b. provide documents which reflect the name of each test's or variation's author or creator; the original publication or

creation date of the test or variation; and the jobs, employer, or industry for which the test or variation was originally designed,

c. **provide documents which describe the process that led to Respondent's implementation of each test or variation, including the names and titles of all key decision makers involved in the process. Include copies of all correspondence, including e-mails exchanged, relating to the decision to implement the test at each of Respondent's locations. Include copies of any and all documents reviewed by any key decision makers in addition. to paragraph 7 below,**

d. **provide documents which reflect the effective dates of use of each test or variation at each of Respondent's locations,**

e. **provide documents which reflect any and all internal regulations or guidelines regarding each test or variation, including any and all regulations or guidelines for individual(s) who administer the test and individual(s) who take the test,**

f. **provide documents which reflect a description of how each test or variation is administered and scored, Include documents which reflect a description of each stage of the process (e.g., application process if the test is used in an employee selection context; or process by which**

employees are deemed eligible to return to work if the test is required of employees returning to work after an extended leave), the point at which the test is administered in this process, the physical setting in which the test is administered, and the name and position of the person(s) who administer and score the test(s).

g. provide documents which reflect or a list of all jobs and job classifications for which any test or variation is used;

h. for each job or job classification for which a test or variation is used, provide documents which identify the specific test or variation (listed in response to paragraph 5) used for that job or job classification,

i. for each job or job classification for which a test or variation is used, provide documents which identify the score(s) that are considered "passing" and "failing", or any other rating classification used, provide documents which reflect the details on the process by which any scoring/classification system was established, and provide documents which reflect the details about the process by which Respondent determined the minimum score considered "passing."

j. or each job or job classification for which a test or variation is used, provide copies of the job descriptions.

k. provide copies of any and all adverse impact studies performed for each test or variation.

Response: McLane objects to this request as irrelevant, overly broad, unduly burdensome and seeking solely to harass the Company. McLane further objects to this request as seeking confidential information. McLane objects to this request and certain terms used therein as vague and ambiguous—particularly the EEOC's use of the term "test." McLane objects to this unlimited request for any and all testing as a fishing expedition constituting an abuse of process by the EEOC.

Further, the Company objects to this request as it is unduly burdensome and would require each company, related entity and/or operating location to produce and/or create extensive information and documentation including but not limited to the use, development, origination, implementation, scoring, and administration of tests at each facility.

As indicated on multiple occasions, McLane has been willing to provide information to allow the EEOC to analyze the validity of the IPCS test prior to the burden and expense of production of the vast amount of information sought on a nationwide basis.

McLane further notes that in response to Ochoa's charge, McLane Sunwest produced detailed information regarding the IPCS test in its position statement, dated April 25, 2008 and the response to the First RFI, dated November 13, 2009, as well as at the

interviews of Theresa Hatch, Human Resources Manager, on March 9, 2010, and Janann Williams, Vice President, People, on August 5, 2010. McLane Sunwest provided additional information in response to the Second Request for Information.

Subject to its objections and the Petition for Revocation, McLane refers the EEOC to the interview of Janann Williams wherein she extensively discussed the implementation of the IPCS exam. McLane is also producing the following:

Bates No.	Document
MCLANE 9-10	List of physical demands and strength definitions
MCLANE 11-29	IPCS Scheduling Manual
MCLANE 30	IPCS sample test result
MCLANE 31	IPCS rating and Job Task Analysis references for relevant positions
MCLANE 32-33	The IPCS Score—What is it?
MCLANE 45	IPCS Advisement letter
MCLANE 46	IPCS Return to Work Letter
MCLANE 47	Pre-employment Functional Capabilities Evaluation
MCLANE 48	Physical Capability Strength Test: One Component of the New Hire Selection Process
MCLANE 49	IPCS Physical Capability Strength Test
MCLANE 50	Guidelines for Physical Capability Assessment
MCLANE 51	Industrial Physical Capability Services, Inc. Application Information Page

McLane is also producing data reflecting all individuals who took the IPCS exam relating to grocery positions. (*See* enclosed CD).

7. Provide copies of any and all validation studies or validation evidence relating to the use of all tests or variations identified in #5 and i#6 [sic] **above, to include any notes or other documents concerning development and implementation of the test by Respondent.**

Response: McLane objects to this request as irrelevant, overly broad, unduly burdensome and seeking solely to harass the Company. McLane further objects to this request as seeking confidential information. McLane objects to this request and certain terms used therein as vague and ambiguous—particularly the EEOC's use of the terms "test" or "variations." McLane objects to this unlimited request for any and all testing as a fishing expedition constituting an abuse of process by the EEOC.

As indicated on multiple occasions, McLane has been willing to provide information to allow the EEOC to analyze the validity of the IPCS test prior to the burden and expense of production of the vast amount of information sought on a nationwide basis.

McLane further notes that in response to Ochoa's charge, McLane Sunwest produced the validation study provided by Vedder Price P.C., dated January 14, 2005, as Exhibit 15 to the position statement submitted on April 25, 2008. Additionally, the Company produced the validation studies provided by Vedder Price

P.C., dated April 21, 2008 and August 23, 2002, as Exhibits 30 and 31 to the First RFI, dated November 13, 2009.

Subject to its objections and the Petition for Revocation, McLane is producing the following:

Bates No.	Document
MCLANE 52-53	January 14, 2005 Opinion Letter by Thomas G. Abram
MCLANE 54-72	The Effectiveness of the IPCS Physical Capability Evaluation Process for McLane Food Service Company A Validation Study by Thomas B. Gilliam, dated 2008
MCLANE 73-83	An Injury Analysis to Determine the Effectiveness of the IPCS Physical Capability Evaluation (PCE) Program on Injury Claim Costs—An Analysis for Food Service and Grocery Divisions of McLane Company
MCLANE 84-86	April 21, 2008 Letter from Thomas Abram to Industrial Physical Capability Services, Inc. re Isokinetic Physical Capability Test
MCLANE 87-88	August 23, 2002 Letter from Thomas Abram to Industrial Physical Capability Services, Inc. re Isokinetic Physical Capability Test

MCLANE 89-98	Executive Summary re A 24-Month Injury Analysis Comparing the New Hire IPCS Isokinetic Evaluation to the Previous 24-Months New Hire Applicants for a Clothing Retail DSC—A Pilot Program
MCLANE 99-105	A Four-Year Injury Analysis Comparing the IPCS Isokinetic Evaluation to a Functional Capacity/Cardiovascular Evaluation on Reducing Exertion Injuries for a Large Food Manufacturer
MCLANE 106-113	Executive Summary re A 35-Month Injury Analysis Comparing the IPCS Isokinetic Evaluation to a Functional Capacity/Cardiovascular Evaluation on Reducing Injuries for Large Food Distribution Company
MCLANE 114-119	Executive Summary re Comparing the IPCS Isokinetie Evaluation to Individuals Not Tested for a Major L-T-L Trucking Company
MCLANE 120-125	A Two Year Injury Analysis to Determine the Effectiveness of the IPCS Physical Capability Evaluation Program on Reducing Injuries for The World's Largest Food Producer

MCLANE 126-131	Executive Summary re A 19-Month Injury Analysis Comparing the IPCS Isokinetic Evaluation to a Functional Capacity/ Cardiovascular Evaluation on Reducing Injuries for a National Food Distribution Company
MCLANE 132-137	A Comprehensive Analysis and Case Study for A Large US Logistics Trucking Company Showing Injury Rate and Injury Costs Comparing IPCS Tested Employees to Employees Not Tested Over a 3-Year Period.

8. For all positions at Respondent's facilities/ locations nationwide for which any test or variation identified in #5 and #6 above is used, provide a copy of the Job Task Analysis for each position. Include

a. documents which reflect or a list of all subject matter experts who were consulted regarding the Job Task Analysis, including name and job title, and

b. any documents containing job analysis information for all positions wherein testing is applied to employees and/or new hires.

Response: McLane objects to this request as irrelevant, overly broad, unduly burdensome and seeking solely to harass the Company. McLane further objects to this request as seeking confidential information.

McLane objects to this request and certain terms used therein as vague and ambiguous—particularly the EEOC's use of the terms "job analysis" and "testing." McLane objects to this unlimited request for any and all testing as a fishing expedition constituting an abuse of process by the EEOC.

As indicated on multiple occasions, McLane has been willing to provide information to allow the EEOC to analyze the validity of the IPCS test prior to the burden and expense of production of the vast amount of information sought on a nationwide basis.

Subject to its objections and the Petition for Revocation, McLane is producing the Job Task Analysis relating to grocery operations:

Bates No.	Document
MCLANE 138-167	Sample job task analysis report
MCLANE 198-202	Damages & Returns
MCLANE 203-207	Mezzanine Selector
MCLANE 208-214	Cigarette Selector
MCLANE 215-219	Cigarette Stamper
MCLANE 220-225	GMP Selector
MCLANE 226-232	Candy Repack.
MCLANE 233-237	Single Cell Grocery
MCLANE 238-242	Sanitation
MCLANE 243-247	Hand Stamper
MCLANE 248-252	Merchandiser

MCLANE 253-258	Yard Spotter
MCLANE 259-263	Forklift Replenishment
MCLANE 264-269	Delivery Driver
MCLANE 270-274	Full Case Selector (dry goods)
MCLANE 275-279	Full Case Loader
MCLANE 280-286	Stocker
MCLANE 287-291	Maintenance-DC Mechanic
MCLANE 292-296	Mechanic
MCLANE 297-300	Inventory Control

9. For January 1, 2006 to the present date, provide documents or a listing* of information identifying all persons who took any test or variation identified in #5 and #6 in connection with employment at any of Respondent's locations or facilities nationwide. The documents or list should be separated for each facility/ location nationwide and include:

a. name

b. social security number

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* The data should be provided on compact disk. It may be written in one of the following formats: Excel. Access or ASCII delimited ("csv"). Other formats may be acceptable if approved by the EEOC prior to submission. Regardless of format, EEOC asks that the first row consist of the, field or variable names with subsequent rows for employee observations without blanks or repeating variable names or titles. There should be one column for each variable requested.

c. last known home address and telephone number

d. date of birth

e. date of application

f. date of hire (or promotion), and job classification at hire (or promotion)

g. test date, test score (overall test score and any and all sub-test scores), name of test administered, test result (pass, fail, or other classification)

h. position held at the time test was administered (for individuals employed at the time or returning to work)

i. position sought at the time test was administered (for individuals returning to work or seeking promotion or hire)

j. reason why test was administered to each person tested

k. date and reason for termination (if applicable)

l. name and job title of any individual(s) responsible for the hiring, promotion, or termination decisions based on test results for each person who took any test or variation.

Response: McLane objects to this request as irrelevant, overly broad, unduly burdensome and seeking solely to harass the Company. McLane further objects to this request as seeking confidential information.

McLane objects to this request and certain terms used therein as vague and ambiguous—particularly the EEOC's reference to the terms "test" or "variation." McLane objects to this unlimited request for any and all testing as a fishing expedition constituting an abuse of process by the EEOC. This nationwide data is not directed to an age-related analysis and is unnecessary to validating the IPCS test.

McLane further objects to this request as it would require the Company to produce or create information, electronically stored or otherwise, in a medium or format other than that in which it is maintained in the normal course of business; require production and indexing of extensive information, the collection and production of which would seriously disrupt the Company's normal business operations and cause significant monetary expense to the Company that would outweigh the probative value of such information; and it seeks information and/or documents that are not relevant to any charge under investigation or the validity of the IPCS test, and therefore are not reasonably calculated to lead to the discovery of admissible evidence. The information requested potentially relates to thousands of applicants and/or employees and is not actively tracked and/or maintained by the Company. It would be unduly burdensome for the Company to produce the requested information as it would require the Company to investigate, categorize, classify and identify information regarding employees on a person-by-person basis.

As indicated on multiple occasions, McLane has been willing to provide information to allow the EEOC to analyze the validity of the IPCS test prior to the burden and expense of production of the vast amount of information sought on a nationwide basis. In this regard and subject to its objections and the Petition for Revocation, McLane is producing a compilation of data reflecting all individuals who took the IPCS exam in relation to grocery positions. (*See* enclosed CD). As the data clearly shows no disparate impact on individuals over the age of 40, it should sufficiently dispel any concerns the EEOC may have and renders further burdensome production unnecessary.

10. Provide documents which reflect or a list of all Respondent's facilities and locations in existence from January 1, 2006 to the present.

Response: McLane objects to this request as irrelevant, overly broad, and seeking solely to harass the Company. McLane objects to this request and certain terms used therein as vague and ambiguous. Subject to its objections and the Petition for Revocation, the following is a list of all McLane Company, Inc.'s related grocery locations:

Division	Phone	Address
McLane Carolina	252-972-2500	7253 NC Hwy 48, Battleboro, NC 27809
McLane Concord	603-746-8000	932 Maple Street, Contoocook, NH 03229
McLane Cumberland	859-887-8200	1040 Baker Lane, Nicholasville, KY 40356

McLane Dothan	334-678-2700	100 McLane Parkway, Cottonwood, AL 36320
McLane High Plains	806-766-2900	1717 E. Loop 289, Lubbock, TX 79403
McLane Mid Atlantic	540-374-2000	56 McLane Drive, Fredericksburg, VA 22406
McLane Midwest	217-477-7500	3400 E. Main St., Danville, IL 61834
McLane Minnesota	507-664-3000	1111 West 5th Street, Northfield, MN 55057
McLane New Jersey	856-351-6200	742 Courses Landing Road, Carneys Point, NJ 08069
McLane Northeast	315-638-7500	2828 McLane Drive, Baldwinsville, NY 13027
McLane Northwest	253-512-1800	9611 45th Avenue SW Bldg. 4, Lakewood, WA 98499
McLane Pacific	209-725-2500	3876 E. Childs Avenue, Merced, CA 95341
McLane Pennsylvania	570-330-8400	43 Valley View Business Park, Jessup, PA 18434
McLane Southeast	706-357-9540	300 Hwy. 29 North, Athens, GA 30603
McLane Southern	601-833-6761	2104 E. Manufacturers Blvd. NE, Brookhaven, MS 39601
McLane So. California	909-887-7500	4472 Georgia Blvd., San Bernardino, CA 92407-1857
McLane Southwest	254-770-2800	2828 Industrial Blvd., Temple, TX 76501

McLane Suneast	407-931-5200	1818 Poinciana Blvd., Kissimmee, FL 34758
McLane Sunwest	623-935-7500	14149 W. McDowell Rd., Goodyear, AZ 85395
McLane Western	303-682-7500	2100 East Ken Pratt Blvd., Longmont, CO 80504

11. For all Respondent facilities/locations nationwide from January 1, 2006 to the present and with respect to any test or variation identified in #5 and #6 above, provide documents or a list of information identifying all persons by name, last known home address and telephone number, and social security number, who were:

a. terminated because of an inability to pass any test or variation,

b. reassigned and/or transferred because of an inability to pass any test or variation,

c. not hired because of an inability to pass any test or variation,

d. not promoted because of an inability to pass any test or variation,

Response: McLane objects to this request as irrelevant, overly broad, unduly burdensome and seeking solely to harass the Company. McLane further objects to this request as seeking confidential information. McLane objects to this request and certain terms used therein as vague and ambiguous—particularly the

EEOC's use of the terms "test," or "variation." McLane objects to this unlimited request for any and all testing as a fishing expedition constituting an abuse of process by the EEOC.

McLane further objects to this request as it would require the Company to produce or create information, electronically stored or otherwise, in a medium or format other than that in which it is maintained in the normal course of business; require production and indexing of extensive information, the collection and production of which would seriously disrupt the Company's normal business operations and cause significant monetary expense to the Company that would outweigh the probative value of such information; and it seeks information and/or documents that are not relevant to any charge under investigation or the validity of the IPCS test, and therefore are not reasonably calculated to lead to the discovery of admissible evidence. The information requested potentially relates to thousands of employees and is not actively tracked and/or maintained by the Company. It would be unduly burdensome for the Company to produce the requested information as it would require the Company to individually investigate, categorize, classify and identify information regarding applicants and/or employees on a person-by-person basis.

As indicated on multiple occasions, McLane has been willing to provide information to allow the EEOC to analyze the validity of the IPCS test prior to the burden and expense of production of the vast amount of information sought on a nationwide basis. McLane is

producing herewith data regarding individuals who took the IPCS exam in relation to grocery positions, (*See* enclosed CD). The data clearly shows that individuals over the age of 40 are not disparately impacted.

12. For each person identified in 11(a) through 11(d), provide documents which reflect:

a date of termination, reassignment, transfer, not hired or not promoted,

b. name and title of the individual who made the decision to terminate, reassign, transfer, not hire and/or not promote the person based on test results.

Response: McLane objects to this request as irrelevant, overly broad, unduly burdensome and seeking solely to harass the Company. McLane further objects to this request as seeking confidential information. McLane objects to this request and certain terms used therein as vague and ambiguous—particularly the EEOC's use of the term "test." McLane objects to this unlimited request relating to any and all testing as a fishing expedition constituting an abuse of process by the EEOC. Without knowing the scope of the EEOC's investigation or any reasonable basis therefore, McLane cannot reasonably respond to this request.

McLane further objects to this request as it would require the Company to produce or create information, electronically stored or otherwise, in a medium or format other than that in which it is maintained in the normal course of business; require production and indexing of extensive information, the collection and

production of which would seriously disrupt the Company's normal business operations and cause significant monetary expense to the Company that would outweigh the probative value of such information; and it seeks information and/or documents that are not relevant to any charge under investigation or the validity of the IPCS test, and therefore are not reasonably calculated to lead to the discovery of admissible evidence. The information requested potentially relates to thousands of applicants and/or employees and is not actively tracked and/or maintained by the Company. It would be unduly burdensome for the Company to produce the requested information as it would require the Company to individually investigate, categorize, classify and identify information regarding its employees on a person-by-person basis.

As indicated on multiple occasions, McLane has been willing to provide information to allow the EEOC to analyze the validity of the IPCS test prior to the burden and expense of production of the vast amount of information sought on a nationwide basis. McLane is producing herewith data regarding individuals who took the IPCS exam in relation to grocery positions. (*See* enclosed CD). The data clearly shows that individuals over the age of 40 are not disparately impacted.

13. For each test or variation identified in #5 or #6, provide any and all documents evidencing any change, whether a reduction or increase, in workplace injuries.

Response: McLane objects to this request as irrelevant, overly broad, unduly burdensome and seeking solely to harass the Company. McLane further objects to this request as seeking confidential information. McLane objects to this request and certain terms used therein as vague and ambiguous—particularly the EEOC's use of the terms "test," or "variation." McLane objects to this unlimited request for any and all testing as a fishing expedition constituting an abuse of process by the EEOC.

Subject to its objections and the Petition for Revocation, McLane is producing herewith data regarding individuals who took the IPCS exam in relation to grocery positions. (*See* enclosed CD). McLane also is in the process of compiling and analyzing certain injury data relating to this request and is willing to confer with the EEOC as to an appropriate scope of production relating thereto. The data, however, could not be compiled for production in the limited time period given for the Subpoena. McLane is producing certain validation studies analyzing the IPCS exam and injury data, and concluding that the use of the IPCS strength evaluation has significantly reduced injuries.

14. From January 1, 2006 to the present, if Respondent received any formal or informal complaints by any employee concerning the test(s), or any claims of discrimination based on age, submit documents evidencing the following;

a. name and job title of each person who complained,

b. name and job title of each person receiving each complaint,

c. date of each complaint,

d. any and all formal and informal written record reflecting the complaint and the name and position title of the person who is subject of the complaint,

e. record of all actions taken by your organization in response to each complaint, including copies of all remedial actions taken.

Response: McLane objects to this request as irrelevant, overly broad, unduly burdensome and seeking solely to harass the Company. McLane objects to this request and certain terms used therein as vague and ambiguous—particularly the EEOC's use of the terms "complaints" and "test." McLane objects to this unlimited request for any and all testing and any complaint—formal or informal and regardless of the complaint—as a fishing expedition constituting an abuse of process by the EEOC.

Subject to its objections and the Petition for Revocation, only the following complaint was received from employees in grocery operations alleging age discrimination based on the use of the IPCS test.

Name	Job Title	Division	Date of Complaint	Subject Matter	Actions Taken/Status
Dick Shahenian	Mechanic Contractor	Contractor with McLane Pacific	Feb, 2009	IPCS + Disability/ Age Claim	File with Fresno, CA EEOC (Charge No. 485-2009-00229); Settled during EEOC mediation for $4,160.00 on 8/2009

15. Provide documents or a lists [sic] of all individuals who applied for a position, for which the test identified in #5 and #6 above was in use, at any location or facility of Respondent from January 1, 2006 to the present. Include:

a. name

b. social security number

c. last known home address and telephone number

d. date of birth

e. date of application

f. whether the applicant was hired, and date and reason for hire or non-hire

g. location at which they applied and position for which they applied,

Response: McLane objects to this request as irrelevant, overly broad, unduly burdensome and seeking solely to harass the Company. McLane further objects to this request as seeking confidential information. McLane objects to this request and certain terms used therein as vague and ambiguous—particularly the EEOC's use of the term "test," McLane objects to this unlimited request for any and all testing as a fishing expedition constituting an abuse of process by the EEOC.

McLane further objects to this request as it would require the Company to produce or create information,

electronically stored or otherwise, in a medium or format other than that in which it is maintained in the normal course of business; require production and indexing of extensive information, the collection and production of which would seriously disrupt the Company's normal business operations and cause significant monetary expense to the Company that would outweigh the probative value of such information; and it seeks information and/or documents that are not relevant to any charge under investigation or the validity of the IPCS test, and therefore are not reasonably calculated to lead to the discovery of admissible evidence. The information requested potentially relates to thousands of applicants and/or employees and is not actively tracked and/or maintained by the Company. It would be unduly burdensome for the Company to produce the requested information as it would require the Company to individually investigate, categorize, classify and identify information regarding its employees on a person-by-person basis.

As indicated on multiple occasions, McLane has been willing to provide information to allow the EEOC to analyze the validity of the IPCS test prior to the burden and expense of production of the vast amount of information sought on a nationwide basis.

Subject to its objections and the Petition for Revocation, McLane is producing herewith data regarding individuals who took the IPCS exam in relation to grocery positions. (*See* enclosed CD). The data clearly shows that individuals over the age of 40 are not disparately impacted.

16. Provide documents or a lists [sic]* **of all individuals who sought promotion or were selected for promotion to a position, for which the test identified in #5 and #6 above was in use, at any and** [sic] **location or facility of Respondent from January 1, 2006 to the present. Include:**

a. name

b. social security number

c. last known home address and telephone number

d. date of birth

e. date promotion sought

f. whether the individual seeking promotion was selected, and, if so, date and reason for selection or nonselection

g. location at which they sought promotion and

h. position for which they sought promotion,

Response: McLane objects to this request as irrelevant, overly broad, unduly burdensome and seeking

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* The data should be provided on compact disk. It may be written in one of the following formats: Excel, Access or ASCII delimited ("csv"). Other formats may be acceptable if approved by the EEOC prior to submission. Regardless of format, EEOC asks that the first row consist of the, field or variable names with subsequent rows for employee observations without blanks or repeating variable names or titles. There should be one column for each variable requested.

solely to harass the Company. McLane further objects to this request as seeking confidential information. McLane objects to this request and certain terms used therein as vague and ambiguous—particularly the EEOC's use of the term "test." McLane objects to this unlimited request for any and all testing as a fishing expedition constituting an abuse of process by the EEOC.

McLane further objects to this request as it would require the Company to produce or create information, electronically stored or otherwise, in a medium or format other than that in which it is maintained in the normal course of business; require production and indexing of extensive information, the collection and production of which would seriously disrupt the Company's normal business operations and cause significant monetary expense to the Company that would outweigh the probative value of such information; and it seeks information and/or documents that are not relevant to any charge under investigation or the validity of the IPCS test, and therefore are not reasonably calculated to lead to the discovery of admissible evidence. The information requested potentially relates to thousands of employees and is not actively tracked and/or maintained by the Company. It would be unduly burdensome for the Company to produce the requested information as it would require the Company to individually investigate, categorize, classify and identify information regarding its employees on a person-by-person basis.

As indicated on multiple occasions, McLane has been willing to provide information to allow the EEOC to analyze the validity of the IPCS test prior to the burden and expense of production of the vast amount of information sought on a nationwide basis.

Subject to its objections and the Petition for Revocation, McLane is producing herewith data regarding individuals who took the IPCS exam in relation to grocery positions. (*See* enclosed CD). The data clearly shows that individuals over the age of 40 are not disparately impacted.

17. Provide documents or a list* of all individuals who were employed by Respondent at any location or facility nationwide from January 1, 2006 to the present. The documents or list should be separated for each facility/location nationwide and include:

a. name

b. social security number

c. last known home address and telephone number

d. date of birth

e. date of, hire

f. all position titles held

g. dates when each position title was held

h. termination date and reason, if applicable.

Response: McLane objects to this request as irrelevant, overly broad, unduly burdensome, and seeking solely to harass the Company. McLane further objects to this request as seeking confidential information. McLane objects to this request and certain terms used therein as vague and ambiguous. McLane objects to this unlimited request for employment information for all of its employees nationwide and the reasons for any of their terminations as a fishing expedition constituting an abuse of process by the EEOC.

McLane further objects to this request as it would require the Company to produce or create information, electronically stored or otherwise, in a medium or format other than that in which it is maintained in the normal course of business; require production and indexing of extensive information, the collection and production of which would seriously disrupt the Company's normal business operations and cause significant monetary expense to the Company that would outweigh the probative value of such information; and it seeks information and/or documents that are not relevant to any charge under investigation or the validity of the IPCS test, and therefore are not reasonably calculated to lead to the discovery of admissible evidence. The information requested relates to thousands of employees.

As indicated on multiple occasions, McLane has been willing to provide information to allow the EEOC to analyze the validity of the IPCS test prior to the burden and expense of production of the vast amount of information sought on a nationwide basis.

Subject to its objections and the Petition for Revocation, McLane is producing herewith data regarding individuals who took the IPCS exam in relation to grocery positions. (*See* enclosed CD). The data clearly shows that individuals over the age of 40 are not disparately impacted.

18. List any and all alternatives to the ICPS or IPCT test that Respondent considered implementing in lieu of the ICPS [sic] **or IPCT test. Include:**

a. copies of all documents Respondent reviewed in considering any such alternatives.

b. copies of all documents relating to any findings, analyses, or determinations made by Respondent regarding any such alternatives.

Response: McLane objects to this request as irrelevant, overly broad, unduly burdensome and seeking solely to harass the Company. McLane further objects to this request as seeking confidential information. McLane objects to this request and certain terms used therein as vague and ambiguous. McLane objects to this unlimited request for any and all testing mechanisms considered as a fishing expedition constituting an abuse of process by the EEOC.

McLane refers the EEOC to the interview of Janann Williams relating to the implementation of the test. As indicated on multiple occasions, McLane has been willing to provide information to allow the EEOC

to analyze the validity of the IPCS test prior to the burden and expense of production of the vast amount of information sought on a nationwide basis.

McLane continues to be committed to working with the EEOC to produce information in a staged or otherwise less burdensome procedure. McLane is producing a significant amount of documents and data herewith. As indicated herein, McLane is also working to compile additional responsive information.

Should you have any questions or would like to further discuss these requests, please give us a call at the contact information provided herein.

Sincerely,

/s/ Ellen L. Perlioni/uf
Ellen L. Perlioni

cc: BARBARA.RUSDEN@EEOC.GOV
Barbara Rusden
Investigator
Equal Employment Opportunity Commission
3300 N. Central Avenue, Suite 690
Phoenix, AZ 85012-2504

* * *

[Doc. 9-6]

EXHIBIT 22

Morgan, Lewis & Bockius LLP
1717 Main Street, Suite 3200
Dallas, TX 75201-7347
Tel: 214.466.4000
Fax: 214.466.4001
www.morganlewis.com

Morgan Lewis
COUNSELORS AT LAW

Ellen L. Perlioni
Partner
214.466.4142
ellen.perlioni@MorganLewis.com

December 6, 2011

VIA EMAIL MEENOO.CHAHBAZI@EEOC.GOV AND REGULAR MAIL

Meenoo Chahbazi
Trial Attorney
U.S. Equal Employment Opportunity Commission
3200 North Central Avenue, Suite 690
Phoenix, Arizona 85012

Re: EEOC v. McLane Company
Charge No.: 540-2010-01761

Dear Ms. Chahbazi:

This letter is in response to your correspondence dated November 2, 2011, regarding the meeting we had on August 25, 2011. First, we appreciate that you took the time to meet with us. As we have said, McLane Company, Inc. ("McLane") is committed to equal opportunity for all employees and potential employees. It is equally committed to providing its employees a safe

environment and limiting the risk of workplace injuries by employing individuals in positions within their strength capabilities. McLane believes that the Industrial Physical Capability Services, Inc.'s (IPCS) physical capability evaluation (PCE), along with the detailed job task analysis of the actual work required of the positions, legitimately serves these goals and is consistent with business necessity. If the EEOC has concerns with the IPCS PCE, or suggestions as to the use of the IPCS PCE, McLane genuinely wants to hear them—which is why we requested the meeting to engage in substantive discussions regarding the IPCS PCE, its job-relatedness and validity. Because we believed the EEOC was equally committed to such discussions, a representative of McLane and I flew to Arizona to personally attend the meeting.

Despite our good faith efforts and expense, the EEOC refused to engage in any substantive discussions regarding the merits of the IPCS PCE. The EEOC also refused to substantively confer as to the Subpoenas and the relevance of the information sought—as opposed to one-sided questioning of whether and to what extent McLane would further respond to the Subpoenas.

As we have mentioned, McLane has legitimate concerns with the Subpoenas given the circumstances and given the breadth of information sought. Although it had significant questions as to the legitimacy of this new ADEA "charge number," and objected to the far reaching and overly broad request for information relating thereto, McLane made clear that it would

cooperate with legitimate requests and has produced a substantial amount of information and documents. Among other things, McLane produced IPCS data that clearly indicates that the IPCS PCE has no disparate impact on individuals over 40—which should effectively obviate the EEOC's concerns as they pertain to the ADEA. Yet, the EEOC refuses to discuss the validity of the IPCS PCE and the lack of disparate impact and insists that the only option available to McLane is to capitulate to the Subpoenas in full or face court action.

Given the indisputable data that the IPCS PCE has no ADEA disparate impact, the EEOC's investigation under the ADEA should cease. Notwithstanding, and although it still believes that the EEOC is utilizing this phantom ADEA charge to exceed the scope of a Title VII investigation, McLane provides further response to the Subpoenas set forth below. *This response is subject to and without waiving any and all of its prior objections to the Subpoenas, which are incorporated herein.*

Specific Responses

As we mentioned previously, despite our diligent efforts, we need additional time to compile information and respond to your letter. We are actively working on compiling information and will continue to supplement this response as we are able. We hope to have the outstanding information discussed herein to the EEOC by

December 22, 2011. For now, McLane responds as follows:

4. As agreed when we met, McLane is providing a copy of the Table of Contents for the handbook versions in effect from January 1, 2006 to the present date (July 2005, September 2008, February 2009, July 2009, January 2010, February 2010, September 2010). To the extent the EEOC, believes that any provision of the handbook that has not already been produced is relevant to its investigation, we will further confer as to that provision.

5(a). You indicated that the EEOC does not believe that it has received a complete list identifying all jobs or job classifications for which IPCS is utilized. Specifically, you reference Break/Pack Selector, Checker/Loader, Checker/Loader (QC), Checker/Loader III, Dock Setter, Driver Helper, File Clerk II, Forklift Operator, Fueler, Fueler/Wash, Full Case Selector, Full Case Selector/Freezer, Janitor, MHE, Maintenance Mechanic, Merge Operator, Palletizer, Receiver, Returns, Selector, Selector IV (Sam Candy), Shuttler, Unloader, Yard Driver, Yard Jockey. We have been and are continuing to look into these job titles and intend to provide a complete list as soon as the data compilation is complete. To date, we have learned that some positions may simply be referred to using different "titles."

6(b). We have provided significant information as to the IPCS PCE. In your letter, you indicate that it is unclear whether the IPCS PCE was originally developed for material handlers in the airline industry based on

certain validation studies conducted in conjunction with American Airlines. You request that McLane clarify the creation date of the IPCS PCE and the employer or industry for which the test was originally designed. It is our understanding that a validation study was conducted in collaboration with American Airlines. We do not, however, believe that the IPCS PCE was developed exclusively for use with material handlers in the airline industry. It is our understanding that the IPCS PCE was developed for use in a wide variety of industries with positions correlating to the physical capability categories developed by the Department of Labor. McLane cannot independently corroborate the creation date for the IPCS PCE. Based on literature from IPCS, McLane believes that the IPCS PCB was developed by Dr. Thomas B. Gilliam in 1998 and has been validated several times since its development.

6(c). As you note, Janann Williams met with EEOC representatives to discuss the decision to utilize and implement IPCS. Ms. Williams already provided the EEOC with the names of the other individuals involved in the decision—as reflected by the names included in your letter. You have recited the names accurately. We are also investigating whether any of the additional documents you requested exist and we will further supplement this response.

6(d). You requested the dates that the IPCS PCE was implemented at each grocery location. The following chart contains the IPCS PCE implementation dates for grocery locations:

McLane Grocery Division	
IPCS Implementation Date	
Location	First Test Date
New Jersey—Drivers	3/5/2004
New Jersey—Warehouse	3/8/2004
Danville—Midwest	4/17/2005
Brookhaven—Southern	10/20/2006
Baldwinsville—Northeast	10/25/2006
Goodyear—Sunwest	10/25/2006
Fredericksburg—Mid Atlantic	10/27/2006
Athens—Southeast	11/16/2006
San Bernardino—So. California	12/20/2006
Contoocook—Concord	1/2/2007
Lubbock—High Plains	1/8/2007
Merced—Pacific	1/18/2007
Kissimmee—Suneast	3/1/2007
Temple—Southwest	3/8/2007
Longmont—Western	4/25/2007
Battleboro—Carolina	5/1/2007
Temple—E-Distribution	6/28/2007
Northfield—Minnesota	9/18/2007
Nicholasville—Cumberland	1/4/2008
Tacoma—Northwest	1/16/2008
Jessup—Pennsylvania	3/12/2008

Your letter also requests dates specific to hiring, promotion, transfer or return-to-work for each position at each location. To clarify, once the IPCS PCE was implemented at a location, it applied to all new hires, all employees seeking an alternative position that required

greater physical capabilities, and all employees returning from a leave of absence of 30 days or more—assuming the position was physically demanding such that IPCS PCE was required. We are investigating whether implementation dates differed for new hire testing versus other types of testing. If we are able to determine that there is any difference we will notify you accordingly.

6(f). McLane has provided substantial documents and information relating to the IPCS PCE. As explained previously and in documents provided: To calculate the IPCS score from the isokinetic evaluation, the following measurements are necessary:

- ☐ Peak Torque—how many foot pounds of torque are generated during each major movement pattern (i.e. knee flexion/extension and shoulder flexion/extension).

- ☐ Body Symmetry ratio scores—the relationship of various body segments is critical to the worker performing the essential functions of the job safely, Specifically, the relationship of the shoulder flexors to the shoulder extensors, knee flexors to the knee extensors, right to left comparisons for the flexors and extensors for the shoulder and knee. In addition, the upper strength relative to the lower body strength is determined.

- ☐ Force curve analysis—each major set of force curves is objectively evaluated for normalcy. The score ranges from 0.0 to 1.0 where 0.0 is a flat line curve (no force generated) to a perfect shaped

curve, which is a 1.0. The force curve is not determined by age or gender. Perfect force curves can be generated by young and old or male and female.

☐ Body weight—body weight is divided into the final absolute score. Body weight is used to make sure the force generated is adequate to not only support an individual's body weight but also to safely perform the essential functions of the job. This means that a person who weighs 250 pounds needs to generate more torque that [sic] a person who weighs 150 pounds.

The body weight factor also has the effect of neutralizing differences between genders since (generally) most females weigh less than males.

These measurements are then applied to a "validated mathematical model," which generates the IPCS physical capability index score. This mathematical formula is considered highly confidential and proprietary to Industrial Physical Capability Services, Inc. McLane does not know and cannot provide the mathematical formula.

6(g). See response to 5(a) above. Additional information will be forthcoming.

6(i). McLane has provided significant information and documentation regarding the IPCS PCE. The DOL physical capability category is determined through the job task analysis prepared by GMSI. The following chart summarizes the physical demand categories and corresponding IPCS score:

Less than Sedentary		Exerting up to 5 pounds of force occasionally (activity or condition exists up to 1/3 of the time), and/or a negligible amount of force frequently (activity or condition exists from 1/3 to 2/3 of the time) to move objects.
Sedentary	.2522	Exerting up to 10 pounds of force occasionally (activity or condition exists up to 1/3 of the time), and/or a negligible amount of force frequently (activity or condition exists from 1/3 to 2/3 of the time) to move objects.
Light	0.59	Exerting up to 15 pounds of force occasionally (activity or condition exists up to 1/3 of the time), and/or up to 5 pounds of force frequently (activity or condition exists from 1/3 to 2/3 of the time), and/or a negligible amount of force constantly to move objects.
Light-Medium	0.83	Exerting 15 to 20 pounds of force occasionally (activity or condition exists up to 1/3 of the time), and/or 5 to 10 pounds of force frequently (activity or condition exists from 1/3 to 2/3 of the time), and/or greater than negligible up to 5 pounds of force constantly to move objects.

Medium	1.08	Exerting 20 to 35 pounds of force occasionally (activity or condition exists up to 1/3 of the time), and/or 10 to 15 pounds of force frequently (activity or condition exists from 1/3 to 2/3 of the time), and/or greater than negligible up to 10 pounds of force constantly to move objects.
Medium-Heavy	1.32	Exerting 35 to 50 pounds of force occasionally (activity or condition exists up to 1/3 of the time), and/or 15 to 25 pounds of force frequently (activity or condition exists from 1/3 to 2/3 of the time), and/or 10 pounds of force constantly to move objects.
Heavy	1.56	Exerting 50 to 75 pounds of force occasionally (activity or condition exists up to 1/3 of the time), and/or 25 to 40 pounds of force frequently (activity or condition exists from 1/3 to 2/3 of the time), and/or 10 to 15 pounds of force constantly to move objects.
Heavy-Very Heavy	2.00	Exerting 75 to 100 pounds of force occasionally (activity or condition exists up to 1/3 of the time), and/or 40 to 50 pounds of force frequently (activity or condition exists from 1/3 to 2/3 of the

		time), and/or 15 to 20 pounds of force constantly to move objects.
Very Heavy	2.43	Exerting in excess of 100 pounds of force occasionally (activity or condition exists up to 1/3 of the time), and/or in excess of 50 pounds of force frequently (activity or condition exists from 1/3 to 2/3 of the time), and/or in excess of 20 pounds of force constantly to move objects.

It is our understanding that IPCS developed the scoring through analysis of employees performing the type of work described in the physical capability rating. As mentioned above, the mathematical formula utilized to determine the physical capability score is considered highly confidential and proprietary to Industrial Physical Capability Services, Inc. McLane does not know and cannot provide the mathematical formula. It is unclear what else, if anything, the EEOC seeks in response to this request. If you could further clarify what you believe to be "incomplete," we will further investigate.

6(j). You stated that you do not believe McLane has provided the EEOC with all job task analyses (JTA) relating to the grocery positions for which IPCS PCE is utilized. To ensure there is no doubt, we are compiling a complete set of job task analyses for grocery positions. We are working on confirming that no other

JTAs exist for grocery positions and we will supplement with the compilation of the JTAs.

6(k). All adverse impact studies relating to McLane's utilization of the IPCS PCE have been produced. McLane did not do any analysis separate from that undertaken by IPCS.

8. See response to 6(j). We are working on compiling information as to the JTAs and will supplement this response.

9, 11, 12, 15, 16. It is not clear why the EEOC needs the individual's names, social security numbers, last known addresses, phone numbers or other personal identifiers to analyze the validity and/or impact of the IPCS PCE. McLane provided significant data that allows the EEOC to analyze both the validity and the impact of the IPCS PCE—which shows that it has no disparate impact on individuals protected by the ADEA. We will further compile a list of facilities where IPCS PCE is administered in relation to positions within the grocery division. We will also provide further response defining and explaining the variables. Once we have been able to compile this additional information, we will supplement this response.

13. We are working on compiling and analyzing the information relating to workplace injuries and the impact of IPCS PCE. We will supplement with this information.

14. We are investigating this request to see if any supplemental information can be provided.

17. We remain perplexed by this request seeking personal information regarding every employee nationwide, regardless of position. We see no reason this information is relevant to the EEOC's investigation and you were unwilling to discuss relevance when we met.

18. To the extent we can identify any alternative tests considered, we will supplement this response.

As mentioned above, we are actively working to compile additional information and further respond. We will supplement this response as further information becomes available. In the interim, if you have any questions, please let us know.

Sincerely,

/s/ Ellen L. Perlioni
Ellen L. Perlioni

[Doc. 9-6]

EXHIBIT C

MORGAN, LEWIS & BOCKIUS LLP
Ronald E. Manthey, TX Bar No. 12927400
ron.manthey@morganlewis.com
Ellen L. Perlioni, TX Bar No. 00794155
ellen.perlioni@morganlewis.com
1717 Main Street
Suite 3200
Dallas, TX 75201-7347
Tel: 214.466.4000
Fax: 214.466.4001

Attorneys for Respondent
McLane Company, Inc.

UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

Equal Employment Opportunity Commission, Petitioner, vs. McLane Company, Inc., Respondent.	Case No. 2:12-mc-00007-GMS **DECLARATION OF KEVIN J. KOCH IN SUPPORT OF RESPONDENT MCLANE COMPANY, INC.'S RESPONSE TO PETITIONER'S APPLICATION FOR ORDER TO SHOW CAUSE WHY ADMINISTRATIVE SUBPOENA SHOULD NOT BE ENFORCED**

DECLARATION OF KEVIN J. KOCH

I, KEVIN J. KOCH, declare as follows:

1. I have personal knowledge of the facts and matters set forth in this declaration and could and would testify competently and truthfully to the same if called as a witness and placed under oath. I am over 18 years of age.

2. I make this declaration in support of Respondent McLane Company, Inc.'s ("McLane") Response to Petitioner's Application for Order to Show Cause why Administrative Subpoena Should Not be Enforced.

3. I am the Vice President of Accounting, Tax, Finance and Governmental Affairs for McLane. I work for McLane and reside in Texas. In my position with McLane, my responsibilities include McLane's banking and treasury functions and I have knowledge of the same, as well as McLane's corporate operations and operating structure hierarchy, including its operating subsidiary corporations.

4. Respondent McLane is a Texas Corporation with its corporate headquarters and principal place of business located in Temple, Texas. It is a supply chain services company that, through its operating subsidiary corporations, supplies grocery products to convenience stores, mass merchants, and drug-stores throughout the United States.

5. In addition to having several discrete operating locations, McLane owns several operating subsidiary corporations that own and operate divisional

distribution centers throughout the United States. For example, in its "Grocery" business, McLane has several corporate subsidiaries, one of which is McLane/ Suneast, Inc. which operates a distribution center in Goodyear, Arizona doing business as McLane Sunwest ("McLane Sunwest.") McLane/Suneast, Inc. is a Texas corporation with its corporate headquarters and principal place of business located in Temple, Texas.

6. Separate from Grocery operations is McLane Foodservice, Inc. which provides supply chain solutions for restaurants, with distribution centers around the country ("Foodservice"). Foodservice is a Texas corporation with its corporate headquarters and principal place of business located in Carrollton, Texas.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on February 15, 2012, at Temple, Texas.

/s/ Kevin J. Koch
KEVIN J. KOCH

— —

[Doc. 9-9]

EXHIBIT D

MORGAN, LEWIS & BOCKIUS LLP
Ronald E. Manthey, TX Bar No. 12927400
ron.manthey@morganlewis.com
Ellen L. Perlioni, TX Bar No. 00794155
ellen.perlioni@morganlewis.com
1717 Main Street
Suite 3200
Dallas, TX 75201-7347
Tel: 214.466.4000
Fax: 214.466.4001

Attorneys for Respondent
McLane Company, Inc.

UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

Equal Employment Opportunity Commission, Petitioner, vs. McLane Company, Inc., Respondent.	Case No. 2:12-mc-00007-GMS **DECLARATION OF JANICE WORSHAM IN SUPPORT OF RESPONDENT MCLANE COMPANY, INC.'S RESPONSE TO PETITIONER'S APPLICATION FOR ORDER TO SHOW CAUSE WHY ADMINISTRATIVE SUBPOENA SHOULD NOT BE ENFORCED**

DECLARATION OF JANICE WORSHAM

1. I, Janice Worsham, declare as follows:

2. I have personal knowledge of the facts and matters set forth in this declaration and could and would testify competently and truthfully to the same if called as a witness and placed under oath. I am over 18 years of age.

3. I make this declaration in support of Respondent McLane Company, Inc.'s ("McLane") Response to Petitioners Application for Order to Show Cause why Administrative Subpoena Should Not be Enforced.

4. I am currently employed by McLane in the position of HRIS Manager. I have held this position since 09/26/2010. As the HRIS Manager, my primary responsibilities include the support (including reporting) and maintenance of HR systems, mainly PeopleSoft. Prior to my current position, I held the position HR Business Analyst. I have been employed by McLane since 12/17/2007. Based on my positions and duties, I have personal knowledge of the PeopleSoft database utilized at McLane.

5. McLane is a supply chain services company, providing grocery supply chain solutions for convenience stores, mass merchants, and drug stores throughout the United States. McLane utilizes a PeopleSoft database to record, track and maintain employment information and records relating to employees. PeopleSoft does not contain any records relating to job applicants.

6. I understand that the EEOC is investigating McLane in relation to its use of the Industrial Physical Capability Services ("IPCS") physical capability exam ("PCE"). PeopleSoft does not track whether or when an individual may have taken the IPCS PCE. There is no way to generate a list from PeopleSoft of those employees who were terminated, demoted, or not hired because they were unable to achieve the minimum physical capability rating to safely perform the essential functions of the position for which they took the IPCS PCE.

7. I have been told that IPCS generated an excel spreadsheet from its database that includes all individuals who have taken the IPCS PCE relating to positions within any of the Grocery operations for McLane ("IPCS Grocery database"). I have been told that the IPCS Grocery Database includes the individuals' names and social security numbers, among other things. I have been told that as of January 20, 2012, the IPCS Grocery Database reveals that 13,883 IPCS PCE were administered for Grocery operations. I am unaware of the volume of data that may exist relating to the separate corporate entity of McLane Foodservice, Inc. ("Foodservice").

8. I understand that the EEOC is seeking information regarding every one of the 13,883 individuals in the IPCS Grocery Database. I believe we could develop and run multiple queries in PeopleSoft to obtain some, but not all, of the information that I understand the EEOC to be requesting. Utilizing the IPCS Grocery

Database, we could likely use multiple queries in PeopleSoft to obtain last known address and home phone, original date of hire, job code at hire, date of termination and the coded reason for termination for all employees that were actually hired. To obtain this particular information that is likely available through a PeopleSoft query would take approximately 10-15 hours, assuming no glitches. Any inaccurate social security numbers will add time to the analysis and will require individualized name searching.

9. PeopleSoft does not track date of application. I believe that a manual search for each of the 13,883 individuals' applications would be required to identify date of application—if such information is available through some source other than PeopleSoft. PeopleSoft does not track IPCS PCE dates and thus could not generate information as to the position held at the time of the IPCS PCE. Also, it would be almost impossible to use a query to generate a report of dates of "promotion" for all of those employees listed on the IPCS spreadsheet. There are so many variables in the job codes reflecting changes to job status, it would require a manual analysis of every job change to determine if the change reflected an actual promotion, and there would be numerous job code changes for every individual in the system.

10. I have been informed that in the IPCS Grocery Database, there are 2,351 IPCS PCE records denoted as not meeting the minimum requirements for the position for which the individual took the IPCS PCE, and for which the EEOC seeks information as to

whether any employment action occurred as a result. Of those, 1,942 individuals did not achieve the minimum requirements to safely perform the essential functions of the position they sought in relation to a IPCS PCE denoted as "New Hire." Assuming that none of the 1,942 individuals were hired, no PeopleSoft data would be available for those individuals.

11. I understand that the EEOC is requesting a list of employees terminated or demoted because they did not achieve the minimum physical capability rating to safely perform the essential functions of a position sought. Assuming the social security numbers in the IPCS Grocery Database are accurate, we would have to manually search these 409 individuals in PeopleSoft to determine whether a job change occurred around the time of the IPCS PCE date (2,351 [Individuals denoted as not achieving the minimum requirements]—1,942 [Individuals denoted as not achieving the minimum requirements for a "New Hire" tests and thus not in PeopleSoft] = 409). This step would be necessary to provide as much information as possible to assist the local human resource representatives in correctly identifying and retrieving the history for the individual. Although we could try and automate this search some by searching for job changes within 90 or so days of the IPCS PCE date, it will require manual analysis and multiple unique queries because of the differing test dates for the individuals. From the PeopleSoft perspective, I believe that this will require at least 25 hours of work. Thereafter, we would need to

get confirmation from local human resource representatives as to each individual identified as having a negative job action within the designated window of time following the IPCS PCE. Confirmation is necessary because the job action could have occurred for reasons unrelated to the IPCS PCE. For example, an individual may have not achieved the minimum necessary requirement on the IPCS PCE, and simply elected to terminate for other reasons (i.e., they elected not to take the IPCS PCE again because they found an intervening higher paying job). The process of confirmation would likely take an average of 30 minutes per person for a total of approximately 205 hours.

12. The PeopleSoft analysis described above would need to be undertaken by me, as I am the primary resources [sic] with the technical capability to perform the queries. Given my other obligations, I could not work on this project full time and would need to build in additional time for completion. Only two people—I and one other teammate—have the ability to work in PeopleSoft, supporting all employment changes and reports needed. Our work often must be completed within a short timeframe to remain compliant with all laws and to meet business necessity. It is therefore impossible to ignore all of our other obligations and work exclusively on retrieving this data. I estimate that I could dedicate 10 hours per week to this project, assuming no emergencies arise.

13. All of this assumes I am only analyzing Grocery Operations. The inclusion of Foodservice would increase all of these estimates.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on February 15, 2012, at Temple, Texas.

/s/ Janice Worsham

* * *

[Doc. 9-11]

EXHIBIT F

MORGAN, LEWIS & BOCKIUS LLP
Ronald E. Manthey, TX Bar No. 12927400
ron.manthey@morganlewis.com
Ellen L. Perlioni, TX Bar No. 00794155
ellen.perlioni@morganlewis.com
1717 Main Street
Suite 3200
Dallas, TX 75201-7347
Tel: 214.466.4000
Fax: 214.466.4001

Attorneys for Respondent
McLane Company, Inc.

UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

Equal Employment Opportunity Commission, Petitioner, vs. McLane Company, Inc., Respondent.	Case No. 2:12-mc-00007-GMS **DECLARATION OF MILINDA SILL IN SUPPORT OF RESPONDENT MCLANE COMPANY, INC.'S RESPONSE TO PETITIONER'S APPLICATION FOR ORDER TO SHOW CAUSE WHY ADMINISTRATIVE SUBPOENA SHOULD NOT BE ENFORCED**

DECLARATION OF MILINDA SILL

1. I, MILINDA SILL, declare as follows:

2. I have personal knowledge of the facts and matters set forth in this declaration and could and would testify competently and truthfully to the same if called as a witness and placed under oath. I am over 18 years of age.

3. I make this declaration in support of Respondent McLane Company, Inc.'s ("McLane") Response to Petitioners Application for Order to Show Cause why Administrative Subpoena Should Not be Enforced.

4. I am currently employed by McLane in the position of Talent Manager. I have held this position since

March 2010. As the Talent Manager, my primary responsibilities are for recruiting and affirmative action plans. Prior to my current position, I held the following positions: Executive Secretary, Information Security Analyst and Technology HR Manager. I have been employed by McLane since April 2000. Based on my positions and duties. I have personal knowledge of the recruiting and hiring processes at McLane, as well as the methodology for applicant tracking.

5. McLane is a supply chain services company, providing grocery supply chain solutions for convenience stores, mass merchants, and drug stores throughout the United States. With regard to its "Grocery" business, McLane has the following distribution centers:

Division	Address
McLane Carolina	7253 NC Hwy 48, Battleboro, NC 27809
McLane Concord	932 Maple Street, Contoocook, NH 03229
McLane Cumberland	1040 Baker Lane, Nicholasville, KY 40356
McLane Dothan	100 McLane Parkway, Cottonwood, AL 36320
McLane High Plains	1717 E. Loop 289, Lubbock, TX 79403
McLane Mid Atlantic	56 McLane Drive, Fredericksburg, VA 22406
McLane Midwest	3400 E. Main St., Danville, IL 61834
McLane Minnesota	1111 West 5th Street, Northfield, MN 55057

McLane New Jersey	742 Courses Landing Road, Carneys Point, NJ 08069
McLane Northeast	2828 McLane Drive, Baldwinsville, NY 13027
McLane Northwest	9611 45th Avenue SW Bldg. 4, Lakewood, WA 98499
McLane Pacific	3876 E. Childs Avenue, Merced, CA 95341
McLane Pennsylvania	43 Valley View Business Park, Jessup, PA 18434
McLane Southeast	300 Hwy. 29 North, Athens, GA 30603
McLane Southern	2104 E. Manufacturers Blvd. NE, Brookhaven, MS 39601
McLane So. California	4472 Georgia Blvd., San Bernardino, CA 92407-1857
McLane Southwest	2828 Industrial Blvd., Temple, TX 76501
McLane Suneast	1818 Poinciana Blvd., Kissimmee, FL 34758
McLane Sunwest	14149 W. McDowell Rd., Goodyear, AZ 85395
McLane Western	2100 East Ken Pratt Blvd., Longmont, CO 80504
McLane Ozark	2788 E. Sawyer Road, Republic, MO 65738

The above chart of Grocery distribution centers does not include any of the operations of McLane Foodservice, Inc. ("Foodservice"). Foodservice provides supply chain solutions for restaurants with 18 separate distribution centers around the country.

6. Each of the 21 different Grocery distribution centers has a local human resource ("HR") manager responsible for the recruiting at that facility. The local HR managers have various different procedures for recruiting, tracking applicants and retaining related documents.

7. The vast majority of recruiting activities at the Grocery facilities relate to physically demanding positions for which physical capability exams through Industrial Physical Capability Services, Inc. ("IPCS") are currently required. Individuals either apply for these positions on-line through McLane's website or submit hard copy applications to the facility. McLane's on-line application process is not an applicant tracking system. Rather, it is merely an Outlook-based routing system that sends the application to the "staffing mailbox" for the appropriate HR representative handling the particular position. Depending on the practice of the particular HR representative, applications submitted through the website could be printed and maintained in hard copy files, or saved in Outlook files as an attachment to the email sent to the staffing mailbox or other similar practice.

8. As an example of my process, I receive emails in my staffing mailbox with applications and/or resumes attached. I review the application and make notations in the email subject line for the disposition of the candidate's application. If I decide to move forward with a candidate. I mark the email in green (I use red if I am not interested in pursuing the candidate further). I file the emails in Outlook subfolders specific to

the particular position for which we are recruiting. I have trained newer HR representatives to use a similar system, but various alternative practices still remain.

9. Applicant tracking is a manual process whereby each local HR manager, or a clerk or other such delegate, maintains an excel spreadsheet with certain fields of information regarding the applicant. The spreadsheets are maintained by facility, by year and retained for two years. I know that some but not all of the Grocery facilities have the spreadsheets for 2009 to the present. Older applicant logs may no longer exist, and will be difficult to locate even if they do still exist.

10. Currently, the excel spreadsheet captures the following information: Last Name, First Name, Applied for which open position, Date applied, Internal/external, Gender, Ethnic Group, Vet Status, Referral Source, Referral Source Name. Last Phase Achieved (disposition), Specific Disposition, and Comments—assuming that all fields are completed correctly.

11. A different version of the spreadsheet was used before this year. Although I do not know exactly how far back the prior version was used. I do know that for the last couple of years, the spreadsheet that was used was designed to capture the following fields: Last Name, First Name, Position for Which Hired, Date applied, Internal/external, Gender, Ethnic Group, Vet Status, Minimally Qualified, Referral Source. First Interview Date, Referred, Second Interview Date, Third

Interview Date, Hired/Not Hired, Offer Date, Reason Not Hired, Comments.

12. If an applicant is hired, their current address and social security number will be entered into PeopleSoft. Prior to the time that an applicant is hired and completes new employee paperwork, we do not request social security numbers. Therefore, if a candidate is not hired, we will never know their social security number, unless they happened to include it on a resume they may have submitted.

13. If an applicant is not hired, their last known address and phone are not logged. The only way to obtain such information would be a manual review of the application or resume they may have submitted—which, as discussed above, could be located in various places such as an attachment to an email saved in an Outlook folder or hard copy files.

14. I have been told that as of January 20, 2012, IPCS data reveals 12,418 IPCS PCE were administered for *new hire* testing for Grocery operations. Of those, 1,942 individuals did not achieve the minimum requirements to safely perform the essential functions of the position they sought. Assuming that none of the 1,942 individuals were hired, no PeopleSoft data would be available, including no social security numbers. Last known addresses and phone numbers would not be available on any log or in any database. To obtain last known addresses and phone numbers would require a manual search of hard copy or outlook files, assuming the applications and resumes still exist.

15. I did some sample searching to see how this might be accomplished using my system of saving the emails in Outlook. If the resume is saved in Outlook, I was able to search for the applicant's name, but this did not always yield a positive result and further folder searching was necessary. Also, after 90 days, emails are archived in a "vault." For those emails already vaulted in subfolders, I could not run a general search and had to first find the actual subfolder to find the applicant's name and then to open the attached resume or application. For those Grocery facilities that do not save applications on Outlook, manual searching of hard copy files would be necessary.

16. Considering all of the variables, I estimate that locating last known addresses, to the extent they still exist, for these applicants would take 30 minutes per person on average. Assuming 1,942 such candidates, using the average of 30 minutes per candidate, this would require 58,260 minutes/971 hours to complete, building in no extra time to account for anomalies and the more time intensive search for the more dated applications. I am also fairly certain that such records will not exist back to 2006. For the most part, this search would have to be done at the local facility site and would be very disruptive to the operations.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on February 16, 2012, at Temple, Texas.

/s/ Milinda Sill
MILINDA SILL

[Doc. 15]

MARY JO O'NEILL, AZ BAR NO. 005924
ANDREA G. BARAN, MO BAR NO. 46520
MEENOO CHAHBAZI, DC BAR NO. 494651
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
3300 N. CENTRAL AVE., SUITE 690
PHOENIX, ARIZONA 85012
TELEPHONE: 602-640-5061
EMAIL: MEENOO.CHAHBAZI@EEOC.GOV

ATTORNEYS FOR PETITIONER

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Equal Employment Opportunity Commission, Petitioner, v. McLane Company Inc., Respondent.	CASE NO. 2:12-MC-00081-PHX-GMS **EEOC'S REPLY TO MCLANE'S RESPONSE TO APPLICATION FOR ORDER TO SHOW CAUSE** (Filed Oct. 23, 2012)

Respondent McLane Company Inc. ("McLane") changes its position to serve its self-interest in a way that rivals the best flip-floppers. McLane previously criticized the EEOC for combining its requests for information in its Title VII/ADA and ADEA investigations, both of which focus on McLane's use of a physical capability exam ("PCE"). Now that EEOC has issued separate subpoenas and move separately to enforce

those subpoenas, McLane argues they should be treated the same. McLane cannot have it both ways. The ADA/Title VII investigation is not the "second bite" of the ADEA investigation; each investigation arises out of different charges alleging different categories of discrimination. Here, the Ochoa charge alleges systemic discrimination based on sex, pregnancy, and disability. Moreover, the Title VII/ADA investigation extends beyond disparate impact to disparate treatment including failure to provide reasonable accommodations under the ADA. McLane admits it cannot provide information about medical conditions or disabilities of those taking the PCE. Thus, EEOC has the authority to seek relevant pedigree information[1], and McLane has not shown the information sought is overbroad or unduly burdensome. The Court should grant EEOC's application to enforce the subpoena so that

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[1] Approximately 20 months have passed since EEOC issued the subpoena at the heart of this action. During that time, EEOC has engaged in numerous conversations with McLane concerning the subpoena, and EEOC has agreed to drop certain requests. Conversely, McLane has provided much of what EEOC requested, including a *corrected* production on September 5, 2012, three weeks *after* EEOC filed the present enforcement action. Thus, the information which EEOC is pursuing in this action is limited to the following "pedigree information" for each test-taker: name, social security number, last known address and telephone number, medical condition (if known), date of hire, position held (only with respect to employees applying for promotions and transfers), and reason for termination if is related to the PCE result. Subpoena Requests 8a-c, e, g, i, l. EEOC is also seeking pedigree information for individuals adversely impacted because they failed the PCE. Subpoena Requests 10, 11a, 14 and 15.

EEOC can finally complete what has now become nearly a five-year investigation.

I. EEOC Has Satisfied All Requirements for Subpoena Enforcement

The parties agree that *E.E.O.C. v. Children's Hosp.*, 719 F.2d 1426, 1428 (9th Cir. 1983) provides the framework for analyzing EEOC subpoenas. In *Children's*, the Ninth Circuit held the scope of judicial inquiry "is quite narrow" and the questions are:

> (1) whether Congress has granted the authority to investigate; (2) whether procedural requirements have been followed; and (3) whether the evidence is relevant and material to the investigation.

719 F.2d at 1428. McLane does not contest the second prong, and its discussion of the other two prongs is focused on this Court's ADEA decision, which is distinguishable because it was based on different facts and law.

A. EEOC Has The Authority To Investigate

Once a charge is filed, EEOC is "required to investigate the charge." *EEOC v. Fed. Ex. Corp.*, 558 F.3d 842, 854-56 (9th Cir. 2009) (citation omitted). "[T]he original charge is sufficient to support EEOC administrative action . . . for any discrimination stated in the charge itself or discovered in the course of a reasonable

investigation of that charge." *EEOC v. Hearst Corp.*, 553 F.2d 579, 580 (9th Cir. 1976). If a charge "raises the specter of systemic discrimination, EEOC has the authority to investigate . . . beyond the alleged individual discrimination." *Fed. Ex.*, 558 F.3d at 855. Thus, a company-wide policy warrants a company investigation and response. *See id.* Moreover, if EEOC uncovers additional facts related to the charge, it is "neither obliged to cast a blind eye" nor to initiate a new charge and conduct a "repetitive investigation." *EEOC v. Gen. Elec. Co.*, 532 F.2d 359, 364-65 (4th Cir. 1976).

Here, Ochoa's Charge, in addition to alleging a policy of gender and pregnancy discrimination, on its face specifically alleges a pattern or practice of discrimination against disabled employees and new hires: "The Physical Capability Strength Test is given to all employees returning to work from a medical leave and all new hires, regardless of job position. I believe the test violates the Americans with Disabilities Act of 1990, as amended." Charge, Did. 2-1, Ex. A, Att. 1. EEOC is therefore entitled to investigate the affects [sic] of the PCE company-wide. *See Fed. Ex.*, 558 F.3d at 855.

In addition, EEOC uncovered other allegations that McLane fails to accommodate individuals with disabilities, refuses to engage in the interactive process, and systemically discriminates based on the company's rigid and uncompromising use of the PCE. *See* Decl., Ex. 3 (filed under seal) (describing the experiences of a former McLane employee with cancer who was told, while she was undergoing chemotherapy, that she would be terminated unless she took the PCE); *see*

also Charges, Ehxs. 1 & 2 (filed under seal) (describing alleged ADA violations in California and Arizona resulting from McLane's use of the PCE). EEOC is not "obliged to cast a blind eye" to these allegations, which provide additional bases for the present investigation. *Gen. Elec. Co.*, 532 F.2d at 365.

B. The Information Sought Is Relevant and Material.

1. EEOC Needs to Contact Test-Takers To Investigate Disability Discrimination.

Unlawful discrimination under the ADA includes "utilizing standards, criteria, or methods of administration that have the effect of discrimination on the basis of disability" 42 U.S.C. § 12112(b)(3)(A). Discrimination also includes "using qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities unless the standard, test or other selection criteria . . . is shown to be job-related for the position in question and is consistent with business necessity." §12112(b)(6). Further, it is unlawful to deny reasonable accommodations to a qualified individual with a disability or to deny employment opportunities "if such denial is based on the need . . . to make reasonable accommodation." §12112(b)(5). The ADA defines a "qualified individual with a disability" as "an individual with a disability who, with or without reasonable accommodation, can

perform the essential function of the employment position such individual holds or desires." § 12111(8).

Here, McLane has failed to provide *any* information regarding medical conditions or disabilities of the rejected applicants or employees who were fired after taking extended medical leave. Because McLane argues it cannot provide this information, *see* Resp. at 16, EEOC needs to be able to contact all test-takers to determine if they are disabled under the ADA and whether they would otherwise be qualified to perform the positions they held or desired. Once EEOC identifies test-takers with disabilities, it will be able to analyze adverse impact and disparate treatment, such as failure to accommodate under the ADA. Without information such as name, address, phone number, and social security number,[2] EEOC cannot even begin to investigate the ADA allegations.

McLane argues EEOC should not receive information regarding individuals with disabilities to the extent McLane was unaware of the disabilities. Resp. at 8-9. This argument is beside the point during subpoena enforcement, as EEOC should not be forced to abandon its obligation to independently investigate charges and simply accept as established fact McLane's assertion that it was not aware of any individuals' disabilities. Moreover, under the ADA, EEOC

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[2] Social security numbers provide EEOC with a way to find individuals who have moved or changed telephone numbers, and they are unique identifiers that can be used to confirm the accuracy of the data otherwise provided by McLane.

may investigate for both disparate impact and disparate treatment. *See E.E.O.C. v. Kronos Inc.*, 620 F.3d 287, 300 (3rd Cir. 2010). While McLane may or may not have been aware of certain test-takers' disabilities (a fact question not appropriate for resolution at the subpoena enforcement stage), the ADA also prohibits employment practices which adversely impact disabled individuals regardless of the employer's intent. *See* 42 U.S.C. §12112(b)(3)(A), (b)(6). As such, EEOC needs to contact test-takers and identify individuals with disabilities to analyze whether any were adversely impacted by McLane's use of the PCE.

McLane also appears to argue that no one who took the PCE could have been disabled because test-takers certified they were physically capable of participating in the test. Resp. at 9. This argument is not only illogical but inconsistent with the law. First, just because one is capable of performing the test does not mean that person is not disabled or that he was not in need of a reasonable accommodation. Second, the argument assumes that the PCE is valid and consistent with business necessity, a defense which is still under investigation and which is entirely inappropriate for determination during a subpoena enforcement proceeding. *See McGregor v. National R.R. Passenger Corp.*, 187 F.3d 1113, 1116 (9th Cir. 1999) (recognizing that the determination of whether a test-taker is "qualified" under the ADA requires an individualized assessment); *Children's*, 719 F.2d at 1429 ("[A] party may not defeat agency authority to investigate with a claim

that could be a defense if the agency subsequently decides to bring an action against it.").

2. McLane's Assumptions Regarding the Applicability of the ADEA Order Are Unfounded.

McLane asserts that it need not produce identities and contact information in this Title VII/ADA investigation because it was not ordered to produce that information in the ADEA proceeding.[3] But McLane neglects to mention key aspects of the Court's findings in the ADEA proceedings that favor a different outcome here. For example, the Court observed during the March 23, 2012 hearing in the ADEA proceeding that test-takers' identities and contact information was not necessary for EEOC to carry out a statistical analysis of whether the test adversely impacted individuals 40 and over. Transcript at 22-23 Only after concluding

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[3] McLane also attaches hundreds of irrelevant documents from the ADEA proceedings in an attempt to twist the facts regarding the ADEA investigation. However, at the ADEA subpoena enforcement hearing held on March 23, 2012, the Court found that McLane had failed to support its accusations that the Commission was using the ADEA investigation for any improper purpose. EEOC urges the Court to ignore McLane's unfounded and unsupported accusations. Tr. at 5. In fact, the Court advised McLane that it did "not want to hear any argument" regarding such allegations. *Id.* The Court further recognized that EEOC can uncover evidence "in a Title VII or an ADA investigation which may provide a legitimate basis for them to begin their own ADEA investigation." Tr. at 4. Additionally, McLane's allegation that EEOC is using "overreaching tactics" is based wholly on hearsay and the statements of people without direct knowledge.

EEOC had not shown that McLane violated the "four-fifths rule" did the Court determined that McLane would not be required to produce contact information. Dkt. 34 at 5.

In the instant Title VII investigation, however, not only is EEOC investigating more than a statistical basis for possible discrimination, but the statistical evidence indicates McLane's application of the PCE *violates the four-fifths rule* with respect to gender [Exh. 5, Cadle Dec.]. Therefore, pursuant to the Court's prior rulings, McLane should be required to produce the identities and contact information for all females adversely affected by the PCE. *See* Dkt. 34 at 5. In addition, although the Court previously observed that contact information was not necessary for a statistical analysis in the age context, the present ADA investigation is not limited to a purely statistical analysis of the possible adverse impact of the PCE on disabled individuals. Even if the ADA investigation were so limited, McLane's admitted inability to provide any disability information puts the instant investigation in stark contrast to the age discrimination investigation. Here, EEOC has no idea which or how many, of the test-takers were disabled, and absent contact information EEOC will never be able to uncover this information and adequately investigate the ADA charges pending against McLane.

[3.] Identities and Contact Information Are Relevant To Both Disparate Impact and Disparate Treatment Cases.

McLane alleges that decisions such as *EEOC v. CRST Van Expedited, Inc.* and *State ex rel. Terry Goddard, Attorney General v. Geo Group, Inc.* do not provide support for the EEOC's position that it needs to identify putative class members because *CRST* and *Geo* are disparate treatment cases. Resp. at 17. However, EEOC is currently investigating both disparate treatment and disparate impact allegations. Additionally, should EEOC find that McLane's testing policies disparately impact test-takers on the basis of sex, pregnancy, or disability, EEOC will have an obligation to engage McLane in efforts to conciliate. *See* 42 U.S.C. §2000e-5(b). To the extent that a monetary settlement was reached, EEOC would need to identify and distribute funds to the individuals harmed by McLane's unlawful employment practices.

II. The Information Sought Is Not Overbroad

It is McLane's burden to demonstrate that EEOC's subpoena is overbroad and it has not met that burden here. *Children's*, 719 F.2d at 1428.

A. EEOC Is Not Seeking Information for Food Services in this Proceeding.

Although McLane repeatedly references its food service division, EEOC is not seeking information

regarding McLane Foodservices in this subpoena proceeding. The current subpoena was directed to McLane Company Inc., which encompasses the grocery division, not the separately-incorporated McLane Foodservice.

B. McLane Agreed to a Nationwide Investigation of the Grocery Division.

McLane repeatedly states that it has agreed to provide data comparable to that ordered in the ADEA proceeding, including nationwide data regarding test scores, gender, and adverse actions taken against test-takers in the grocery division. It is therefore undisputed in this proceeding that EEOC should receive nationwide data regarding the grocery division.

C. The Charges Received by EEOC Warrant a Systemic Investigation.

As discussed above, the Ninth Circuit recognizes that EEOC is entitled to company-wide data when investigating a Respondent's company-wide employment practices. *Fed. Ex.*, 558 F.3d at 854-56. McLane administers the PCE company-wide and nationwide in its grocery division. Resp. at 11. Ochoa's charge and the other charges filed under seal allege that McLane's use of the PCE causes broad systemic discrimination against women and disabled applicants and employees. Dkt 2-1, Att 1; Ex. 1; Ex. 2. Because the charges plainly raise the "specter of systemic discrimination,"

EEOC's nationwide investigation is proper. *Fed. Ex.*, 558 F.3d at 854-56.

McLane's arguments regarding the charges at issue are unavailing. First, an individual may file a charge of discrimination on behalf of herself or others. *See* 42 U.S.C. §2000e-5(b). Consequently, it does not matter whether pregnancy is a disability or whether Ochoa had a condition related to her pregnancy that substantially limited a major life activity. *Id.* Second, it does not matter that Ochoa worked for McLane Sunwest as opposed to McLane Companies, Inc. because McLane Companies uses the PCE throughout its facilities, including those of McLane Sunwest. *See Fed. Ex.*, 558 F.3d at 854-56. Finally, the cases relied on by McLane are distinguishable. In *EEOC v. Burlington Northern & Sante Fe R.R.*, the EEOC based its subpoena on charges that did not contain allegations of a pattern or practice of discrimination. 669 F.3d 1154, 1158 (10th Cir. 2012). Likewise, the charges discussed in *EEOC v. Packard Elec.* were individual complaints lacking systemic allegations. 669 F.2d 315, 316 (5th Cir. 1978). By contrast, the present Ochoa charge alleges violations of the ADA premised on the use of the PCE with "*all employees* returning to work from a medical leave and *all new hires, regardless of job position.*" Charge, Dkt 2-1, Att. 1 (emphasis added). In contrast with *BNSF*, EEOC has also provided the Court with

two additional charges containing systemic allegations, a declaration and subpoena, Exhs. 1 2, 3, 4 (under seal).[4]

III. McLane Fails To Demonstrate an Undue Burden

It is McLane's responsibility to demonstrate undue burden. *Children's*, 719 F.2d at 1428. Again, McLane fails to meet its responsibility.

A. Providing Names and Social Security Numbers of All Test-takers Is Less Burdensome Than Redacting That Information.

Names and social security numbers for all test-takers are readily available to McLane and can be easily produced because they are maintained in the IPCS database. McLane admits it withheld names and social security numbers when it produced the IPCS data to EEOC. Dkt, 9-10, Ex. E, at ¶8. It was more burdensome for McLane to withhold this information than to produce it. Indeed, it does not appear that McLane even argues that providing names and social security numbers would pose an undue burden.

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[4] McLane has previously received notice from EEOC since at least February 2012 that these charges are connected to the Commission's Ochoa investigation because the Commission has issued another Title VII/ADA subpoena regarding the IPCS test to McLane under all three charges. *See* Subpoena (Ex. 4) (under seal).

B. Providing Employee Contact Information, Dates of Hire, Dates of Termination, and Reasons for Termination Is Not Unduly Burdensome.

Most of McLane's arguments surrounding the burden of providing specific information is based on the fact that such information in [sic] not contained in the IPCS database, which is the database containing PCE test results. *See* Resp. at 13-16. McLane, however, maintains last known address, home phone, date of hire, job code, date of termination, and reason for termination in its PeopleSoft database. Worsham Decl., at ¶8 (Dkt 9-9). The PeopleSoft database contains this information for all employees but not for job applicants. *Id.* at ¶5. Thus, by cross referencing the two databases using social security numbers, McLane could easily provide, for all employees, contact information, dates of hire, positions held, dates of termination and reasons for termination. *Id.* at ¶8 (estimating 10-15 hours); Exh. 6, Wojtusik Decl. at 10. To the extent PeopleSoft contains other data that complies with or approximates EEOC's requests for information, McLane can easily provide this information as well. *Id.*

C. Providing Addresses and Phone Numbers for Applicants/New Hires Is Not Unduly Burdensome.

McLane's estimates of the burden to produce information related to applicants who are not in the PeopleSoft database exaggerates the personal time

required to provide the requested information and neglects to consider that outsourcing may be a more effective use of the company's resources[5]. To begin, contrary to the time consuming manual searches describe [sic] by McLane officials, a search of electronic applications could be accomplished in other far more expedient ways such as by exporting electronic content to an e-discovery platform. Exh. 6, Wojtusik Decl, at 11. If McLane is unwilling or unable to conduct such an export and search itself, it can enlist an e-discovery vendor to assist at a relatively low cost to the company. *Id.* at 12. Or it can enlist the support of EEOC's own e-discovery experts. *Id.* at 13. As for hard-copy applicants, it should take no more than a couple minutes to extract contact information from the application and plug it into the existing database of test-takers, a far cry from the 30 minutes estimated by McLane. *Id.* at 14. Or McLane could provide hard copy applications to EEOC so that it can locate relevant pedigree information itself. Whatever the situation, McLane fails to carry its burden to show undue burden.

IV. Conclusion

Although McLane attempts to muddy the water with various side arguments and accusations, this case boils down to whether the information requested by

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[5] Notably, McLane also fails to provide the Court with any estimate of McLane's financial resources from which the Court could evaluate monetary burden.

EEOC is relevant to the ADA and Title VII investigations. EEOC has shown relevance, and McLane has not met its burden of demonstrating that the information sought is overly broad or unduly burdensome. An order to show cause should be granted.

RESPECTFULLY SUBMITTED this 23rd day of October, 2012.

MARY JO O'NEILL
Regional Attorney

ANDREA G. BARAN
Supervisory Trial Attorney

s/ Meenoo Chahbazi
MEENOO CHAHBAZI
Trial Attorney

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Phoenix District Office
3300 North Central Avenue, Suite 690
Phoenix, Arizona 85012

Attorneys for Petitioner

[Certificate Of Service Omitted]

* * *

[Doc. 15-5]

EXHIBIT 5

Mary Jo O'Neill, AZ Bar No. 005924
Andrea G. Baran, MO Bar No. 46520
Meenoo Chahbazi, DC Bar No. 494651
Equal Employment Opportunity Commission
3300 N. Central Ave., Suite 690
Phoenix, Arizona 85012
Telephone: 602-640-5061
Email: mary.oneill@eeoc.gov
andrea.baran@eeoc.gov
meenoo.chahbazi@eeoc.gov

Attorneys for Petitioner

UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

Equal Employment Opportunity Commission, Petitioner vs. McLane Company, Inc. Respondent.	Case No. 2:12-mc-00081-PHX-GMS **SUPPLEMENTAL DECLARATION OF ELIZABETH CADLE IN SUPPORT OF APPLICATION FOR ORDER TO SHOW CAUSE WHY AN ADMINISTRATIVE SUBPOENA SHOULD NOT BE ENFORCED**

STATE OF ARIZONA)
) ss.
COUNTY OF MARICOPA)

I, Elizabeth Cadle, solemnly state as follows:

1. I am the Deputy District Director and the Systemic Coordinator of the Phoenix District Office of the Equal Employment Opportunity Commission ("EEOC"), and, in that role, I am responsible for the investigation of charges of employment discrimination for the EEOC Phoenix District Office. I have been with the EEOC for 37 years as an Investigator, Local Office Director, Enforcement Manager, and now as a Deputy Director. I am the Deputy Director for the Phoenix District Office of the EEOC and have responsibility for the investigation of charges in the states of Utah, Arizona, Colorado, New Mexico and Wyoming. We have three offices in our District, the District Office in Phoenix, a Field Office in Denver and the Area Office in Albuquerque. We are one of 15 EEOC District Offices in the country.

2. The Phoenix District Office is responsible for investigating charges wherein employers are alleged to have engaged in employment practices made unlawful by Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.* ("Title VII"), the Genetic Information Discrimination Act, 29 USC § 216(e) ("GINA"), The Equal Pay Act, 29 U.S.C. §206 ("EPA"), the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. § 621 *et seq.* ("ADEA").and the Americans with Disabilities Act of 1990 as amended, 42 U.S.C. §§ 12101 *et seq.* ("ADA").

3. I have examined our records and the Phoenix District Office EEOC has found cause in less than 7% of the charges of discrimination which it has completed during the last five years. The Phoenix Office issued 218 cause findings out of 3,364 resolutions for the fiscal year ending September 30, 2012, less than 7% of our resolutions.

4. In the Phoenix office alone (not including the charges in the Denver and Albuquerque Offices), the EEOC currently has 2,337 pending charges, and we currently have only 21 investigators to investigate those charges and the investigators are continuing to take in new charges every day. During the last fiscal year, the Phoenix Office received 3,194 charges and resolved 3,364 charges through investigation with a maximum of 26 investigators. We do not have the resources to pursue investigations where we do not discover evidence of discrimination.

5. If during an investigation of a charge, we uncover evidence of other possible violations like and related to the allegations in the current charge, it is our public duty to further investigate the like and related matters.

6. I have reviewed the files in this case. In our investigation of Damiana Ochoa's Charge, Charge No. 540-2008-01093, we have discovered evidence that McLane may have denied reasonable accommodations to individuals with disabilities who were asked to take a physical capability exam ("PCE"). We have also received two additional charges from former McLane

employees who allege that McLane's use of the PCE violated their rights under the ADA.

7. According to the information provided by McLane, since McLane started using the PCE test in the grocery division in March of 2005, more than 3,000 new hires or current employees in the grocery division may have been denied employment as an applicant or terminated as an employee after returning from medical leave because they could not pass the PCE.

8. In our investigation of Ms. Ochoa's Charge, we have also discovered evidence that individuals with disabilities are not taking the medical leave recommended by their doctors to address their medical needs, such as chemotherapy, because they are afraid they will be forced to take the PCE for the first time, that they will fail the PCE, and that they will then lose their jobs.

9. The EEOC acts in the public interest to prevent employment discrimination and attempts to investigate all claims of potentially aggrieved individuals who may have been discriminated against by an employer's policies, practices and/or procedures.

10. When the EEOC is investigating a Title VII or ADA charge, and finds a policy, practice, test, and/or procedure that may be discriminatory on the basis of age, the Commission may initiate its own directed investigation to further investigate age discrimination under the ADEA. That is what the EEOC did when it discovered evidence of age discrimination when investigating the Ochoa Charge—it initiated an ADEA

directed investigation to investigate potential violations of the ADEA. The EEOC reasonably believed that McLane's use of the physical strength test could have an adverse affect [sic] on older applicants and older employees attempting to return to work from a medical leave.

11. In the interest of efficiency for both the respondent and the EEOC, when the Commission is investigating more than one charge of discrimination against the same respondent regarding the same policy, the EEOC may and does conduct simultaneous, coordinated investigations of charges against the same employer.

12. When the EEOC sought to obtain information regarding both the Ochoa Title VII/ADA Charge and the ADEA Directed investigation in one request for information, the EEOC did so in the interest of efficiency, both for the benefit of McLane and for the EEOC. McLane heavily criticized the EEOC for "intermingling the investigations." However, this is a routine EEOC practice that enables the EEOC to work as a more efficient and effective law enforcement office.

13. After receiving complaints from McLane, the EEOC decided to separate the requests for information regarding the Ochoa Title VII/ADA investigation and the ADEA directed investigation and to issue separate subpoenas for the requested information. The subpoenas were issued on February 11, 2011 for ADEA and on February 15, 2011 for Title VII/ADA investigation.

14. McLane's allegation that the EEOC initiated the ADEA directed investigation to obtain information relating to the ADA/Title VII investigation is untrue and unfounded. The EEOC reasonably believed, and continues to believe, that McLane's use of the PCE may have an adverse impact on older applicants and older employees.

15. McLane argues that the EEOC initiated the age discrimination investigation because McLane objected to the August 24, 2009 coordinated request for information. (Dkt 9-9, Exhibit B, Stenson Decl. ¶¶ 9-10, Case No. 2:12-GMS-00615, Dkt 9, p. 2). But McLane did not raise any objections to the EEOC August 24, 2009 request for information. See November 13, 2009 Response, Dkt 2-1, Ex. A, Attachment 8. Additionally, McLane itself admits that the EEOC requested information regarding age discrimination in its August 24, 2009 RFI, which demonstrates that the EEOC was interested in investigating age discrimination before it sent out the August 24, 2009 request, before receiving McLane's response, and before the EEOC initiated an ADEA directed investigation on August 6. 2010. (Dkt 9-9, Exhibit B, Stenson Decl. ¶ 9).

16. The EEOC has additionally received a charge of discrimination from a former employee who alleges McLane discriminated against her and a class of individuals on the basis of age. *See* Ex. 2. The EEOC has also attached a declaration from a former employee who alleges that McLane's use of the physical strength test was discriminatory toward her and other older individuals, in violation of the ADEA. *See* Ex. 3.

17. The EEOC has also received additional information that supports its Title VII gender investigation. On September 5, 2012, McLane provided additional data to the EEOC regarding the test results for employees and new hires/applicants who took the PCE. The data provided by McLane included 15,941 entries of individuals who took the PCE, and provided the gender of 15,902 test-takers (39 of the entries did not include gender and/or test result). Of the 15,902 entries, 2,471 out of 4,123 females passed the test, and 10,384 out of 11,779 males passed test. The test passage rate for females is approximately 59.9% and the test passage rate for males is approximately 88.2%. Therefore, the pass rate for females is at a rate that is approximately 68% of the pass rate for males.

18. The EEOC has also found that the disparity between female and male test passage rates is statistically significant. Additionally, even when the EEOC adjusts the data for repeat test-takers by analyzing new hires, return to work, and transfers separately, the disparity is both statistically significant and the ratio of female to male test passage is less than four-fifths, demonstrating evidence of a violation of the four-fifths rule.

19. The four-fifths rule, which is also referred to as the 80% rule, states that the selection rate of the group in question should be at least 80% of the selection rate of the comparison group. In this instance, the ratio of female to male pass rates is 67.9 percent (59.9 percent divided by 88.2 percent). Since 67.9 percent is less than four-fifths (80 percent), the four-fifths rule

would suggest that the IPCS has an adverse impact on women.

Date: October 23, 2012. /s/ Elizabeth Cadle
Elizabeth Cadle

[Doc. 15-2]

EXHIBIT 6

Mary Jo O'Neill, AZ Bar No. 005924
Andrea G. Baran, MO Bar No. 46520
Meenoo Chahbazi, DC Bar No. 494651
Equal Employment Opportunity Commission, Phoenix District Office
3300 N. Central Ave., Suite 690
Phoenix, AZ 85012
Telephone: (602) 640-5061
Fax: (602) 640-5009
Email: mary.oneill@eeoc.gov
andrea.baran@eeoc.gov
meenoo.chahbazi@eeoc.gov

Attorneys for Petitioner

UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

Equal Employment Opportunity Commission, Petitioner, vs. McLane Company, Inc., Respondent.	Case No. 2:12-mc-00081-PHX-GMS **DECLARATION OF TIMOTHY WOJTUSIK IN SUPPORT OF PETITIONER EEOC'S APPLICATION FOR ORDER TO SHOW CAUSE WHY ADMINISTRATIVE SUBPOENA SHOULD NOT BE ENFORCED**

I, Timothy Wojtusik, pursuant to 28 U.S.C. 1746 hereby state and depose as follows:

1. I am a Litigation Support Manager for the Office of General Counsel of the Equal Employment Opportunity Commission. I work in the Phoenix District Office. I have served in that position since July 17, 2010. Prior to that I was an Information Technology Specialist for the Equal Employment Opportunity Commission in the Chicago District Office and served in that position since September 21, 2002.

2. As a Litigation Support Manager, I am responsible for the management of e-Discovery and electronic evidence processing. I am also certified by the International Society of Forensic Computer Examiners (ISFCE) as a Certified Computer Examiner (CCE) in

digital forensics, which means I have successfully completed and passed all testing requirements by the ISFCE Certification Board. As a member of the International Society of Forensic Computer Examiners, I am bound by the ISFCE code of ethics which means that I must comply with all legal orders of the courts and thoroughly examine all evidence within the scope of the engagement. It also means that I must not reveal any confidential matters or knowledge learned in an examination without an order from a court of competent jurisdiction or with the express permission of the client. Confirmation of my membership and certification and a complete list of ISFCE code of ethics can be found at ISFCE.com.

3. The Phoenix District Office recently requested my assistance in the above-captioned case because Respondent's attorney represented that Respondent was unwilling or unable to search for the information requested in the EEOC's McLane Subpoena re Ochoa, Subpoena No. Phx-11-32.

4. According to McLane, it uses human resource software called PeopleSoft. PeopleSoft is the industry leader in human resource software and was built with specific capabilities which enable users to effectively manage data through extraction, analysis, manipulation and reporting. See www.oracle.com/us/products/applications/pcoplesoft.

5. PeopleSoft is capable of providing users with data in many forms and comes with built-in functionality to query, export and report data from its databases.

6. PeopleSoft is an industry leading, state of the art integrated software package that provides a wide variety of business applications to assist in the day-to-day execution and operation of business processes. This software by design is engineered to manage, manipulate, and report on the data it holds. PeopleSoft has built- in functionality to query and report (Query Manager) on all data and to export that data into many types of formats, including comma delimited and excel. It is relatively easy to export data from PeopleSoft and is in no way burdensome to the user as McLane has stated. It should not be unduly burdensome for Respondent to query its PeopleSoft system for the name, addresses, social security numbers, phone numbers, dates of hire, dates of termination, position held, and code for the reason for termination of the employees who took the physical capability exam ("PCE") dating back to 2006. In fact, it should take no longer than an hour to obtain this data through a query.

7. According to Respondent, it employs the use of a Industrial Physical Capability Services (IPCS) (www.ipcs.inc.com) which provides physical capability testing. IPCS is a testing service; its website describes itself as providing "results driven by data."

8. Respondent has already provided some limited database information extracted from IPCS and

should be capable of providing further information which, at a minimum, includes the names and social security number of all test-takers, including all applicants/new hires who took the PCE. It should in no way be burdensome for IPCS to provide the names and social security numbers of Respondent's applicants/new hires who took the PCE. Again, databases are designed and used for the purposes of managing and reporting (exporting) on the information stored.

9. McLane's website (www.mclane.com) has an online electronic application system. The applications (see Exhibit A) request the applicant's name, address, and phone number. Just as with the IPCS website data, this information could be easily extracted and provided to the EEOC and would in no way be burdensome or costly. It will not be unduly burdensome for McLane to provide the addresses and phone numbers of applicants/new hires who applied online. If necessary, the EEOC is willing to make a complete copy of McLane's online applicant system data and perform the extraction of the appropriate data. Based upon my experience, I believe this extraction could be done in just a few hours if McLane would give the EEOC the native or raw database(s).

10. Since all of the above mentioned systems have the ability to export data in like formats, any data that is in the IPCS database, the McLane website, and the PeopleSoft database can be exported and merged to create one new comprehensive database(s). All that is required is a unique identifier common across these

databases (a "key" field), such as a social security number. Key fields and the use of a key field to merge separate databases is common place for database users and administrators. To merge the two databases is not particularly difficult and it can be accomplished in a few hours. Once accomplished, to find out who was terminated within 90 days of taking a PCE, McLane would just have to create a query or report condition to sort responses where test dates are less than 90 days from separation and the code for termination from the PeopleSoft database could be provided describing why an employee was terminated. The EEOC could do this exportation, merger and query across databases and produce a report if McLane gave the EEOC the native or raw databases. I believe it would take half of a day or less to complete, even if these are large databases.

11. In her Declaration, Melinda Sill describes only one way with in which data could be extracted from Respondent's Outlook e-mail system. The method she describes would be time consuming and burdensome. However, it is well known in the e-Discovery industry that there are, in fact, several ways of extracting e-mail and attachment information from email systems such as Microsoft Exchange and Outlook. For example, if Respondent has 21 human resource (see Sill Affidavit, p. 3, par. 6) custodians of records nationwide that have e-mail productions that pertain to this subpoena request, one simple and effective method to extract the information would be to export the entire contents of each custodian's mailbox and move those

exports to an e-discovery platform (such as Concordance or Summation or Ringtail) that are built and designed to search e-mail collections and consolidate data from same. The functionality to accomplish this is built into Microsoft Exchange\Outlook. Based upon my experience, I believe that exporting all of the custodian mailboxes can be done with tools that already exist within the Microsoft Exchange\Outlook system and would take on average less than an hour per mailbox.

12. A second method for extracting the needed e-mails from Outlook would be to consult with an e-discovery vendor that could assist with the process of extracting the e-mails and attachments and for which the costs are relatively low.

13. If absolutely necessary, the EEOC is willing to consult with Respondent on methods of extracting the needed information into useable formats and is willing to accept raw data that it can analyze, returning any privileged or non-relevant information to Respondent before it is viewed by Petitioner EEOC.

14. I am assuming that the vast majority of the 2,239 applications of applicants/new hires who did not pass the PCE and did not become employees are submitted online since there's an online application system and McLane discusses in detail the online applications it receives in the Sill Declaration. As described above exporting data from the online applications is a relatively simple and efficient process. Sill

also refers to Excel spreadsheets that contain additional information regarding applicants. Sill's Declaration does not clarify whether or not the phone numbers and addresses of new hires/applicants who failed the PCE are maintained on the Excel spreadsheets or entered into PeopleSoft or another database. To the extent new hire/applicant addresses or phone numbers for hard copy applicants are on any databases they can easily be extracted. For the remaining hard copy applications of new hires/applicants who took the PCE, it will not be unduly burdensome for McLane to enter phone numbers and addresses into the IPCS database/spreadsheet. I have reviewed a copy of Ms. Ochoa's hard copy application. (See Exhibit B). I believe it will take two minutes or less per new hire/applicant to enter this information onto an Excel spreadsheet from the hard copy application, if there is no online application or other databases that contain this information.

October 23, 2012 /s/ Timothy Wojtuski
Date Timothy Wojtuski

[Doc. 30]

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Equal Employment Opportunity Commission, Petitioner, vs. McLane Company, Inc., Respondent.	)	No. CV 12-2469-PHX-GMS Phoenix, Arizona November 16, 2012 10:04 a.m.

REPORTER'S TRANSCRIPT OF PROCEEDINGS

BEFORE THE HONORABLE G. MURRAY SNOW

(Show Cause Hearing)

[2] APPEARANCES

For the Petitioner:

Mary Joleen O'Neill, Esq.
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
3300 N. Central Ave., Suite 690
Phoenix, Arizona 85012-1848

Sean W. Ratliff, Esq.
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
303 E. 17th Ave., Suite 410
Denver, Colorado 80203

For the Respondent:

Ashley T. Kasarjian, Esq.
Joshua R. Woodard, Esq.
SNELL & WILMER, L.L.P.
1 Arizona Center 400 E. Van Buren
Phoenix, Arizona 85004-2202

Ellen L. Perlioni, Esq.
MORGAN, LEWIS &
BOCKIUS, L.L.P.
1717 Main Street, Suite 3200
Dallas, Texas 75201-7347

[3] PROCEEDINGS

THE COURT: Thank you. Please be seated.

THE CLERK: This is miscellaneous case number 12-81, EEOC v. McLane Company, on for show cause hearing.

Counsel, please announce.

MR. RATLIFF: Good morning, Your Honor. This is Sean Ratliff on behalf of the Equal Employment Opportunity Commission, and with me is Mary Jo O'Neill.

MS. O'NEILL: Good morning, Your Honor.

THE COURT: Good morning.

MR. WOODARD: Good morning, Your Honor. Josh Woodard on behalf of respondent, and with me here this morning is Ellen Perlioni and Ashley

Kasarjian, also on behalf of respondent. And joining us today is respondent's corporate counsel, Kim Magyar.

THE COURT: All right.

Mr. Ratliff.

MR. RATLIFF: Good morning, Your Honor.

As we have not met before, my name is Sean Ratliff, and I am filling in for Meenoo Chahbazi, who has been on this case prior to myself.

THE COURT: Um-hum.

MR. RATLIFF: She's on an extended leave of absence and is expected to return, hopefully, next summer, so I will be [4] taking over in the meantime.

At issue in this case is subpoena number—

THE COURT: Let me just get right to the point.

MR. RATLIFF: Yes.

THE COURT: Pregnancy's not a disability, is it?

MR. RATLIFF: Not typically, no.

THE COURT: Is it in this case? Is there any allegation that pregnancy is a disability in this case?

MR. RATLIFF: Not that I am aware of. I believe that the charge that we're talking about, the

Ochoa charge, on its face alleges disability discrimination; however, on behalf of other people. And under the—

THE COURT: Can I allege disability discrimination on behalf of other people in front of the EEOC?

MR. RATLIFF: Yes, you may.

THE COURT: And is this Court allowed to determine whether or not the charge party—charging party can recover on that basis as part of whether or not the subpoenaed information is relevant?

Why couldn't I do that?

MR. RATLIFF: I'm sorry. Could you repeat that question for me?

THE COURT: Well, let's say you're pregnant.

MR. RATLIFF: Yes.

THE COURT: Let's say that McLane engages in a [5] procedure which you think discriminates against you based on your pregnancy, or maternity leave, or leave of absence, or whatever, related to your pregnancy. Okay. You do not have an ADA claim.

MR. RATLIFF: Not under most circumstances, Your Honor.

THE COURT: And you're not claiming that there exists one in this case.

MR. RATLIFF: At this point, the investigation is still underway. I don't know that a determination as to that—

THE COURT: You can't represent to me now that it does in this case.

MR. RATLIFF: At this point, I can't represent to you that, you know, there's a finding that her pregnancy would constitute a disability. However, an individual—disabled or not—is still, under our regulations and under the statute, allowed to make charges of discrimination on behalf of others. It's explicitly stated in the statute, Title VII.

THE COURT: Where in the statute?

MR. RATLIFF: That would be, I believe, Section 706(a) or (b). I'm not entire—I can't—

THE COURT: I'm sorry. Can you give me the title number?

MR. RATLIFF: Sorry. 42 U.S.C. 2000e dash—I guess [6] it would probably be 6.

THE COURT: 706(a) or (b).

MR. RATLIFF: I believe that is the case, Your Honor.

THE COURT: All right. And am I allowed—even if it is permitted for persons to make claims of discrimination on behalf of others when they are themselves not subject to such discrimination, we'll assume that for purposes of this case Ms. Ochoa is not subject

to disability discrimination, even though that could change, right now you're not representing to me that it has changed, am I allowed to consider that in determining the extent to which the subpoenaed information is relevant to the investigation of the charge?

MR. RATLIFF: To the extent that an individual can file a charge on behalf of other people, they do not have to be part of that protected class to do so, and the Court should look to the charge itself and to the investigation to determine whether or not the subpoena in this case is relevant.

THE COURT: But can I consider whether the person themselves can recover on behalf of the charge in determining whether or not the information sought is relevant or burdensome?

MR. RATLIFF: I don't believe that that should factor into the Court's analysis. I think that the case law—

THE COURT: Well, I understand that you wouldn't believe that it should factor in the analysis. Do you have any [7] case authority that suggests that it can't factor into the analysis?

MR. RATLIFF: I am aware of no case law that would say that because somebody is not part of the protected class themselves, that that somehow changes the relevancy dictates that—that the Ninth Circuit has enunciated, which is to look at the charge and to look at the EEOC's investigation to see if what we've asked for is relevant.

THE COURT: All right. I understand your point. You can proceed.

MR. RATLIFF: Okay. Thank you.

And in the—in that vein, I think that what the Court needs to consider here today is the face of the Ochoa charge as well as the investigation that the EEOC has currently conducted.

As you know, this is a case involving a physical capabilities test which tests people's strength in their legs and in their shoulders. During the course of our investigation the EEOC has learned that McLane applies this same test across all of its facilities. We've uncovered evidence that the IPCS, the third-party company that administers this physical capability test, markets the test not only as a way to determine whether or not people have sufficient strength, but also as a means to reduce obesity in the workplace.

We've learned that there are—the test itself [8] factors in people's weight, for example, in determining what—their scores on the particular test. They've produced, McClane has produced certain validation studies that the EEOC is still investigating, and the methodology there appears somewhat questionable, which is why we're looking into that.

We also have some evidence that the test is being applied discriminatorily. There's some e-mails out there talking about how the test should be applied to people who are considered overweight.

We've also, through this process, uncovered other charges of discrimination, which we attached to our reply brief. And so, really, at issue here is the—there's a handful of topics the EEOC still doesn't have responses from McLane on three years later.

Now, they have provided us with a number of the information that we requested in the subpoena. But there—the outstanding issues here are really what the Court has called pedigree information: people's names; people's Social Security numbers; last-known addresses; telephone number; medical condition, to the extent that they would know what that is; the date of hire and positions held; and the reasons for somebody's termination; in particular, whether or not they were let go or not hired because they couldn't pass the IP—

THE COURT: Do that with me one more time. Name. Social. Medical condition.

[9] MR. RATLIFF: Last-known address.

THE COURT: Okay.

MR. RATLIFF: Telephone number. Date of hire. The position they held. And the reasons for their termination. In particular, whether or not the termination was the result of a failure to pass the capabilities test.

So that's all we're talking about here in the subpoena enforcement procedure, and I think the parties and the Court can all agree that the framework that the Ninth Circuit has set out is fairly straightforward. The EEOC needs to show that we have the authority

to investigate the case; that we have met our procedure requirements; that the evidence is relevant; and in terms of relevance, Shell Oil dictates that we look at both the charge as well as the investigation the EEOC has conducted, and that that is not a particularly constraining analysis.

Once the EEOC shows those three things, the burden then shifts to the respondent to show either overbreadth or undue burden. And when we're talking about overbreadth, I think it's very important that the—the Court distinguish between EE—

THE COURT: Let me ask you this, on the overbreadth or the undue burden point: If I require the production of the name, the social, the last-known address, the telephone number, can't you get the rest of the information?

Why in the world should they provide you with medical [10] conditions?

MR. RATLIFF: Well, Your Honor, that is exactly why I think in this particular instance it's one of the reasons that we need the name and—and the last-known address, because they don't seem to have these.

THE COURT: I understand, but if they—if I were to require them to give you that, then why do you—and maybe I suppose that I might need to require them to give you whether or not the reason for their termination was their failure to pass the test, why, then, can't the EEOC take upon itself the burden of discovering the other information?

MR. RATLIFF: I think that absolutely, the EEOC could do that. To the extent that they had easily accessible documentation about people's medical conditions or disabilities and it wouldn't pose a burden on them, I think that that's also something that the Court should order in this case—

THE COURT: What about—

MR. RATLIFF: —but if they don't—

THE COURT: Relating to what I did earlier on the ADEA matter, if McLane wanted to incur the burden of giving you all this information without the name and the address but they wanted to incur the cost, what would prevent me from ordering that?

Then if you could demonstrate, based on identifying information—in other words, not name and address, but [11] employee number 1, 2, 3, however many—if they want to give you the information, if they want to incur the expense of giving you the information on an employee-by-employee basis, and then you can demonstrate, for example, under a gendered discrimination you can demonstrate that there is a possible disparate impact case, or you could demonstrate, based on an identified medical condition, a possible ADEA case, why, then, couldn't you come back and request the identity of persons who might be involved in such claims?

MR. RATLIFF: You know, Your Honor, I think that perhaps the EEOC has not done as good of a job as it could have explaining the reasons why we

need people's names and their contact information, and why we would want to talk to them in this particular instance. And, you know, I think the most obvious reason is—

THE COURT: Well, let me tell you my concern; I'll just lay it out there. I don't know—I appreciate that it's the EEOC's desire and job to enforce federal statutes to the full extent of its authority. But legislation is always, it seems to me, a bit of a compromise, and businesses I don't think are interested, and I'm not sure that Congress is interested, in allowing you to use these—to use discovery to, as I've otherwise indicated, troll for potential plaintiffs who aren't otherwise unhappy or undamaged, without demonstrating that you have a claim first, or some basis to [12] believe that you have a claim. My concern is balancing those two concerns. And it is true that the EEOC has yet to convince me, at least in the previous case, that the actual identities of the persons were either relevant or necessary to your stating the claim.

This case, as you've indicated, has a slightly different posture, it's one that is worth considering in that different posture, so explain to me—I've set forth two options for you. One is either they give you the names and addresses and the reason for termination and you incur the cost of doing the rest; or if they wish to incur the cost, they, on a numbered-employee basis, give you all the information you've sought without the names, addresses, and personally identifying information, pending your ability to demonstrate that you may have claims on behalf of these people.

So tell me—in the first scenario, if I give you the names and addresses, I assume you don't need to address that, because then you'll have the names and addresses and identifying information. Tell me why the second scenario wouldn't work, if that's what McLane wants to do, if they wish to incur that expense.

MR. RATLIFF: I'd be happy to.

Well, to the extent that McLane could provide us disability information, we'll just assume that they can—

THE COURT: Right.

[13] MR. RATLIFF: —in the second scenario.

THE COURT: Right.

MR. RATLIFF: In addition—

THE COURT: And we'll assume that that would cost them—I mean, they've already indicated, with some plausibility, that that would be a burdensome request. But I'll—I'll assume under my scenario that it's a request that they've opted to shoulder rather than to give you the identifying information.

MR. RATLIFF: I understand, Your Honor.

The reason that the EEOC needs to talk to these people, even if they—McLane were able to identify that they're disabled, is that this is—this is a case where we've got adverse impact allegations. McLane says that this test is equally applied to all employees. The

EEOC is not required to accept that statement at face value.

THE COURT: All right.

MR. RATLIFF: The only way we can iden—figure out—

THE COURT: But how does the individual identification of employees help you understand if this third party—I guess independent contractor—administers the test differently to different people?

Wouldn't a subpoena to that contractor about their test protocols be more—more along that line?

[14] MR. RATLIFF: I don't believe so, Your Honor. I think that it's important for the EEOC to be able to talk to actual people who took the test, whether they're men or women or disabled or not.

THE COURT: And I'm certainly not saying in my hypothetical that you couldn't. But I'm demonstrating that you would have to demonstrate that you have a case before I would—before I would consider the other information relevant, in terms of all the balancing that I have—that the Court is required to do, in balancing burdens and relevance, relevance considerations.

MR. RATLIFF: Well, I think, Your Honor, that the case law would indicate that—

THE COURT: What's your best case for the fact that I don't have such discretion?

MR. RATLIFF: Well, I'm not— I'm not indicating that the Court has no discretion. What I'm indicating is that—that relevance is determined by the charge at hand. The EEOC, in moving forward with a subpoena—

THE COURT: So I, as a third party who cannot state the charge on myself, on my own behalf, can raise any charge, and that gives the EEOC unbounded authority to investigate that charge, even though I can't possibly recover based on it? That's what you're telling me.

MR. RATLIFF: The EEOC's job is to enforce the federal [15] statutes against discrimination.

THE COURT: Right.

MR. RATLIFF: When we receive an allegation from somebody, that—that allegation, that charge, is a sworn statement.

THE COURT: I understand.

MR. RATLIFF: So—so when—

THE COURT: A sworn statement is a charge on which that person cannot recover, at least as it pertains to the ADA. It seems to me that she does have—she has stated a claim she can recover for based on gender discrimination.

And so I think it's clear that—that McLane is going to have to give you at least the gender information of the individual test-takers, but they've indicated to

me, if I understand the papers correctly, they've already agreed to do that, is that correct?

MR. RATLIFF: They've agreed to provide the EEOC and have provided the EEOC with the gender of test-takers.

THE COURT: In an individually identifiable way. So you're not—

MR. RATLIFF: We do not have contact information or names of anyone.

THE COURT: No, I know you don't have names or contact information, but they're saying: This is a female. Here are her test results, whatever else you're interested in.

[16] MR. RATLIFF: Correct. They have provided that, Your Honor.

So to get back to the issue of why the EEOC would need to talk to these people is to, one, figure out, you know, is this test being equally applied to all individuals? And without talking to actual people we can't do that.

Another reason would be to—

THE COURT: Why couldn't you—my question was, again: Why couldn't you find that out by subpoenaing information or doing an investigation of the—of the contractor that administers the test?

MR. RATLIFF: Well, I think that we—we certainly could talk to the contractor that administers

the test. I don't necessarily believe that that would provide us with a full perspective of what was going on.

And once again, when you're talking about the independent contractor, they have a vested interest in making sure that it appears that they, you know, apply this test equally, and we would need to talk to people to see if that's actually how it happens.

THE COURT: Okay.

MR. RATLIFF: We also need to talk to people, Your Honor, to look at things like the validity of this test in the first place. They've claimed that their test is valid, that it measures actual work functions. You know, it makes sense that [17] the EEOC would want to talk to people who actually perform these functions at their job to see if in fact this is the type of test that would measure what they do.

I mean, if the test measures, Can I lift 50 pounds, right? We would want to talk to somebody that does that job: Do you really have to lift 50 pounds? Right?

We may want to talk to people who have been out on leave: Why were you on leave? Were you on leave because of your pregnancy? Were you on leave because, you know, you were sick? Were you on leave to take care of somebody else? All this helps us figure out the whole picture of the story and what's going on.

The investigation doesn't end, and the analysis isn't dependent entirely upon whether or not there is a disparate impact. They have a—they have defenses of their own that talk about whether or not the test is job

related and consistent with business necessity. We have an obligation to see if the test is job related and consistent with business necessity.

Some of these people, our understanding is, have worked for this company far before there ever was this test. If they have done this job for 20 years, or 10 years, or whatever it is, and then all of a sudden McLane implements a test and they go out on leave, or they choose not to go out on leave, which is some of the evidence that we have, because [18] they're afraid that they won't be able to pass the test when they come back, and yet they're still doing their job right now, that would indicate to us that this—this test may not be job related.

And so I think it's very important for the EEOC, for a host of reasons other than to determine whether or not someone is disabled, which is, I think, the most obvious reason we would want to talk to people in this case, to want to talk to folks.

THE COURT: All right. Anything else?

MR. RATLIFF: I wouldn't mind addressing, if you—the burdensomeness argument that they've raised here.

According to their own declarations, Mr. Worsham's declaration, which is included in the record at 9-9, docket number, the IPCS database had Social Security numbers; it has people's names.

Their PeopleSoft database has peoples' names, their address, their phone number, their Social Security number, their dates of hire, their date of termination and the termination code, all information that is at issue here.

THE COURT: Well, I appreciate it, and I think I understand your point.

I am going to direct rather—a rather pointed question, I think, to Mr. Woodard, which will be: If it's burdensome, why not just give them the names? And then let [19] them do the—let you do the collection of other information.

MR. RATLIFF: That, I believe, Your Honor, would make sense, to give us the names.

To the extent that they're giving us names, they can take the Social Security numbers as unique identifiers in these two databases, and according to our experts that we've talked to that do a lot of work with databases, it only takes a matter of minutes, typically, and at most, if there's some glitches, a few hours, to merge databases if you have a common identifier like a Social Security number.

So to the extent that they have all of this information in PeopleSoft, which has a Social Security number, and all of this information is in the IPCS database as well, it should take little or no time, certainly not a burdensome amount of time, for them to merge those two databases.

I think where they have a little bit more of a stronger argument, probably, is with respect to the applicants, the folks that are not in their PeopleSoft database. But even there there's a problem, and that's that we're only talking about 2,239 applications.

THE COURT: I got that.

MR. RATLIFF: Okay. So their explanation is silent as to where these applications are, how they're maintained. We know that they have some online applications, and I would just put up for the Court here an exhibit—this is taken from [20] their online application system. And as—oh, that's not the wrong—that's the wrong one. Here we go. This one.

This is the online application system, and this is Exhibit A to Mr. Wojtusik's declaration, which we included with our reply.

As you can see, all this stuff is entered electronically. You know, the position that they applied for. Their names, their addresses, all of this stuff, the present home address, their Social Security number, all the things that we're asking for is already electronically maintained.

When you go onto an online system and you put in your application information, that's going into some sort of database. And according to their, you know, declarations, that thing gets sent out to the relative H—relevant HR manager.

So what they haven't explained is why can't you just go to this original database where all of this stuff

is being inputted, and again merge, based on these Social Security numbers the applicants put in there.

THE COURT: Okay. Anything else?

MR. RATLIFF: Well, in terms of paper applications, I would—I would argue the same thing. Even if everything was a paper application, their folks have estimated it would take 30 minutes. This is their paper application. Once they pull an application, they have the home address; they have the Social Security number. All that stuff is right on the face. [21] It doesn't take 30 minutes to look at that and code it into a database.

And moreover, even if they didn't want to do that themselves, we've done a little research with our, you know, IT folks and whatnot, and apparently you can have a third-party vendor come in and code that type of information into a database for you for, like, 25 or 35 cents a page. Even if all 2,200 applicants were in a hard copy we're talking about a few hundred dollars, hardly something that would seem burdensome for a company, especially when they haven't even told us, you know, you're supposed to weigh, in terms of burden, the resources versus the cost. They've said nothing in terms of their burden about what their resources are, Your Honor. So I just—we would contend that they have failed, in many ways, to even articulate how this would be burdensome.

THE COURT: Okay. Thank you.

Anything else?

MR. RATLIFF: At this point, no, Your Honor. I'm happy to answer any other questions that you might have, though.

THE COURT: All right. I'll give them to you if I have them.

Mr. Woodard.

Even if Ms. Ochoa can't personally recover under the ADA, she can raise an ADA claim, and that does give, since it's [22] raised on its face, it does give the EEOC power to investigate the claim, doesn't it?

MR. WOODARD: We don't believe so, Your Honor. If that were the standard, the EEOC could toss any given protected class status in there, whether or not the people was included in that protected class status. In other words, there's no aggrieved party here.

THE COURT: All right. And I'll look at that pretty carefully. I am going to check the cases and read them myself after today's hearing's over to determine what the appropriate scope of the investigation is.

If, however, I determine that—well, is there any dispute about the fact that Ms. Ochoa did make an ADA complaint to the EEOC? On its face?

MR. WOODARD: The charge on its face does include an allegation that the PCE violates the ADA.

THE COURT: Okay.

MR. WOODARD: She does not—oh, I'm sorry, Your Honor.

THE COURT: That's all right. Go ahead.

MR. WOODARD: She does not claim that her pregnancy amounted to a disability. I know the Court had some initial questions. In fact, if you look at the charge itself, they only list pregnancy under the Title VII violation.

THE COURT: And I'm going to look at that. I do have [23] some concerns about it, for the reasons that I—that I previously discussed with Mr. Ratliff.

But if in fact I determine that under the Ninth Circuit, the mere fact that she has stated the claim on its face, even though she doesn't have the right to recover, still gives the EEOC power to investigate it, and I am going to look at that carefully, then to the extent that you can't—and I understand why you can't necessarily know what the medical conditions of the test-takers are, why isn't it relevant for the EEOC to have the names of those who have taken the test so that they can ascertain if in fact they had medical conditions?

MR. WOODARD: The ADA does not lend itself well, especially in this instance, to a disparate impact analysis, Your Honor. The EEOC has never articulated any theory what type of medical condition are we talking about? Are we talking about somebody who's been out for 30 days due to pneumonia?

Due to a ski accident? Due to mental depression? Due to cancer treatment? It could be a whole host of things. This is a highly individualized analysis that

you must go through. It really falls into—this particular case falls into a disparate treatment issue.

Now, this is not a case, Your Honor, where the policy says, Hey, if you've ever had cancer you can't take the evaluation; or, If you have trouble hearing or seeing, you can't undergo the evaluation. We could have a different [24] discussion on that issue.

Here, when you look at it, on a disability you have to figure out whether the person's disabled; whether McLane knew about it; whether there's a reasonable accommodation; whether that reasonable accommodation was supplied; and whether they could perform the essential functions of the job.

To just canvass the nation for, quote, medical condition, that's a highly individualized analysis. And when you go back to the face of the charge, and in the EEOC's reply, they indicate that this evaluation is given to every employee. And their reply says it's a rigid and uncompromising evaluation given to the employees.

When you look at that, that is by its very nature, under the Raytheon case, this is a disparate impact charge that they've brought. There's no allegation that any individual has a disparate treatment charge. This is a disparate impact charge and so we have to treat it as such.

Now, with respect to the Title VII issues, just so the Court is clear, McLane has produced all the information that the EEOC needs in order to run a disparate impact analysis. They have—

THE COURT: In terms of Title VII.

MR. WOODARD: Yes, Title VII.

THE COURT: Um-hum.

MR. WOODARD: They have gender; test dates; reasons [25] for test; the results of the test; an adverse action that occurred within 90 days, consistent with the Court's ADEA order.

So if this is a disparate impact case under

Title VII—I'll get to ADA in just a second. If it's a disparate impact case under Title VII, the EEOC has everything it needs.

Now, consistent—staying with Title VII, Your Honor, if this is a disparate treatment Title VII case, one, there's no allegations on the face of the charge that Ms. Ochoa had to take the test but her colleague, who's a male, did not have to take the test, or Ms. Ochoa had different strength requirements than her male colleague; there's no allegation that this is a disparate treatment.

But even assuming that there is, that's a highly individualized analysis. You have to go identify the motives of the decision makers out at SunWest. That does

not give the EEOC carte blanche authority for nationwide pedigree. They don't need it on a disparate treatment test, and they don't need it on an disparate impact. So no matter how you get there under Title VII, they don't need the pedigree information.

Moving now to the AD—ADA—

THE COURT: Well—

MR. WOODARD: —this is—

THE COURT: —what you're really suggesting, isn't [26] it—well, I've got to look at the face of the charge, right?

MR. WOODARD: That's a logical place to start, because I think the EEOC's authority arises out of the allegations in the charge itself.

THE COURT: All right. So the charge says something about—although the charge raises concerns about the pregnancy, it also says something about the ADA in connection with that leave because of pregnancy.

MR. WOODARD: It does not, Your Honor.

THE COURT: Well, it can be inferred, fairly inferred?

MR. WOODARD: I don't believe so.

THE COURT: Well, if it is fairly inferred, even if it's fairly inferred to be a—and I guess I would

be inclined to fairly infer that it relates to a—an allegation that pregnancy is a disability, and to the extent that pregnancy isn't a disability under the ADA they've raised no charge, your point is that if we were to treat this as a violation of the ADA no matter what the disability, then the investigation is completely unfocused, and so you can't even distinguish between whether or not it is a disparate impact or a disparate treatment claim.

Is that what you're saying?

MR. WOODARD: Yes, Your Honor, that is. There is no focus, and so what medical condition are they looking at? Even assuming that information's available, which I [27] think is a—an unfounded assumption—

THE COURT: So if I were to reasonably infer that she's claiming that her pregnancy is the disability—all right. I think I see where—what you're saying. Go ahead.

MR. WOODARD: Just to further that point, Your Honor, the disability is not an immutable characteristic like age, gender, or race. And once you start getting into individualized assessments of somebody's medical conditions, and whether or not it's a disability, and whether or not there's a failure to accommodate, that takes it out of the realm of the disparate impact and it goes into a disparate treatment. And the—

THE COURT: I think I'm understanding your point on this. Is there anything else you want to say on it?

MR. WOODARD: Not on that particular point, Your Honor, other than it appears—well, even the EEOC recognizes in its—in its pleadings that the disability issue is a disparate treatment case. And if they don't have alleged victims, that's what they're doing, they're trolling for them. And we think it's just overreaching, and it doesn't relate to the allegations in the charge, which is where their authority stems.

THE COURT: All right.

MR. WOODARD: I'll be pleased to address any burden questions that the—

[28] THE COURT: Well—

MR. WOODARD: —Court may have.

THE COURT: —if in fact, after I look at this, I determine that the nature of the charge allows the EEOC to investigate all cases of possible ADA claims, whether they be disparate impact or disparate treatment, why wouldn't it be best, in terms of the burden analysis, for me to simply say: Provide them the name, the Social Security number, the last-known address, if you have it, and if the reason for their termination was their failure to pass the test, you have to so designate. And then the EEOC can bear the rest of the burden of researching the other categories of information that they've requested.

What would be burdensome about that?

MR. WOODARD: Well, we can go through each of those. The names of employees, McLane has ready access to that. Not much—

THE COURT: There are about 2,000 that you don't have that are—that you never hired.

MR. WOODARD: That's correct. And those names are not easily obtained.

THE COURT: Okay. You heard Mr. Ratliff talk about the electronic application system, the hard copy application system. You've got 2,000 of those. Why would that shut down McLane to provide just the name and the last-known address from [29] those folks?

MR. WOODARD: A couple reasons. One, I wouldn't suggest it would shut down McLane, for sure. But I would suggest that not all 21 locations of McLane have online applications. There are some online applications. However, that does not go into any central database. In addition, it's not searchable.

So in addition to hard copy files kept in—in up to 21 different ways, although I'm not representing that to the Court, several different ways out across the country not readily accessible, some online applications, they're not housed in a central repository online anywhere, and they're not searchable. So there is—there is quite a bit of burden with respect to getting applicant names.

The far harder one, Your Honor, is the medical condition. That, you'd have to cull through 15,000 files.

THE COURT: Well, again, it wouldn't be your burden to figure that out; it would be the EEOC's burden to figure that out.

MR. WOODARD: Well, and it gets—and I understand the Court said, Assuming the Court finds this, this, and this. But again, if they've—if it's not a disparate impact analysis, they're doing nothing more than searching for victims. And imagine—

THE COURT: I understand, but I'm—but you're right: [30] I've taken that off the table in my hypothetical and I've assumed that I've found this, this, and this.

If you assume that I found that, doesn't it remove a significant part of the burden from you if I simply say: Disclose the name, the last-known address, and for those who you employed, if the reason for their termination was the failure to pass this test, you need to disclose that, EEOC has to find everything else out, why would it be burdensome for you to do that?

MR. WOODARD: That would be less burdensome, I agree, Your Honor, assuming we could get those names, addresses, and telephone numbers, and it could shift the burden, assuming all those factors have been found.

THE COURT: Okay. Anything else you have to add?

MR. WOODARD: Not at this time, unless the Court has further questions.

THE COURT: No, thank you.

Mr. Ratliff, do you have anything else more you'd like to say?

MR. RATLIFF: Briefly, Your Honor.

I listed off a number of the outstanding issues here, and I will just say that the EEOC will be more than happy to do the work ourselves in determining disability if they provide us with the name, Social Security number, last-known address, telephone number, and the reasons for their termination, all [32] stuff that is maintained on their electronic PeopleSoft database.

And for the applicants, even assuming—let's just assume for a moment—and they haven't proven this in any way, shape, or form through the declarations—that everything was in hard copy, and they were all spread out over 20 facilities, they have the names and the IPCS—

THE COURT: I'll tell you, just so—to save you the time, if I—

MR. RATLIFF: Okay.

THE COURT: —find that you're entitled to do this kind of a detailed analysis, the 2100 or so non-unemployed people is not going to convince me that there's enough of a burden that they don't have to comply. Okay?

MR. RATLIFF: Well, then I will stop there.

THE COURT: All right.

MR. RATLIFF: The one other thing that I would address is when talking about whether or not someone can bring a charge on behalf of other people, the Court may also want to look at the FedEx case from the Ninth Circuit.

THE COURT: I am going to look at it. You did cite it. I'm going to look at it carefully. But it does strike me—and I'm going to give you the last chance to address this—as Mr. Woodard made the point in his oral argument, I mean, how can I really construe this other than being—even [32] if I give it a liberal construction, it's a liberal construction that pregnancy constitutes a disability, and—if I give the complaint a liberal construction—therefore, you've done—you've disparately treated pregnant women even with a liberal construction.

So wouldn't I have to limit the charge to one of pregnancy and not open it up to every possible disability that an employee might make against McLane?

MR. RATLIFF: No, Your Honor, for two reasons. The statute allows somebody to assert a violation on behalf of other people. The person asserting the violation does not have to be part of that—

THE COURT: And what about that complaint tells me that Ms.—

Is it Ochoa?

MR. RATLIFF: Yes.

THE COURT: —is asserting a general claim of disability discrimination no matter the disability on behalf of any McLane employee?

MR. RATLIFF: Well, I think, Your Honor—

THE COURT: Let me see the face of the charge, please.

MR. RATLIFF: Here is the face of the charge, Your Honor. I'll put it up. Clear it here.

That last paragraph, The physical capability strength test is given to all employees returning to work from a medical [33] leave and all new hires, regardless of job position, I believe the test violates the Americans with Disabilities Act as amended.

So she is asserting this not on behalf of just herself; most of her individual claims are contained in these paragraphs. She has included a separate paragraph here which asserts a systemic violation under the ADA. And so she has brought that just as the plaintiff in the FedEx case, who was an African American, asserted violations based on national origin on behalf of Hispanic employees, she's done the same thing here. She's asserted a violation on behalf of other people that she believes are being affected by this PCE.

THE COURT: Okay.

MR. RATLIFF: Thank you, Your Honor.

THE COURT: Thank you. I'm going to look at this very carefully. I don't know when I'll issue a ruling but it won't be too terribly long. Thank you.

MR. RATLIFF: Thank you.

MR. WOODARD: Thank you, Your Honor.

(Proceedings concluded at 10:46 a.m.)